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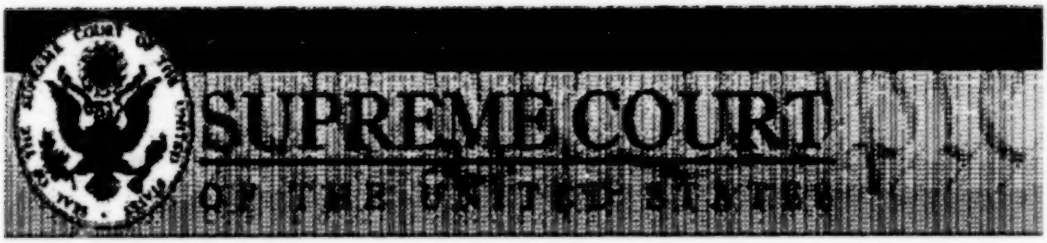

No. 13-895
Vide 13-1138

Title:	Alabama Legislative Black Caucus, et al., Appellants v. Alabama, et al.
Docketed:	January 27, 2014
Linked with 14A335	
Lower Ct:	United States District Court for the Middle District of Alabama
Case Nos.:	(2:12-cv-691, 2:12-cv-1081)
Decision Date:	December 20, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 23 2014	Statement as to jurisdiction filed. (Response due February 26, 2014)
Jan 23 2014	Appendix of Alabama Legislative Black Caucus, et al. filed.
Feb 4 2014	Order extending time to file response to statement as to jurisdiction to and including March 28, 2014.
Mar 24 2014	Order further extending time to file response to petition to and including April 21, 2014.
Apr 21 2014	Motion to dismiss or affirm filed by appellees Alabama, et al.
May 2 2014	Reply of appellants Alabama Legislative Black Caucus, et al. filed.
May 6 2014	DISTRIBUTED for Conference of May 22, 2014.
May 27 2014	DISTRIBUTED for Conference of May 29, 2014.
Jun 2 2014	PROBABLE JURISDICTION NOTED limited to Question 2 presented by the statement as to jurisdiction. Probable jurisdiction is noted in No. 13-1138 limited to Question 1 presented by the statement as to jurisdiction. The cases are consolidated and a total of one hour is allotted for oral argument.
Jul 10 2014	Consent to the filing of amicus curiae briefs in support of either party or of neither party, received from counsel for the appellees.
Jul 22 2014	The time to file the joint appendix and appellants' briefs on the merits is extended to and including August 13, 2014.
Jul 22 2014	The time to file appellees' briefs on the merits is extended to and including October 9, 2014.
Aug 13 2014	Brief of appellants Alabama Legislative Black Caucus, et al. filed.
Aug 13 2014	Joint appendix filed. VIDED. (Statement of costs filed)
Aug 15 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the appellants.
Aug 20 2014	Brief amicus curiae of the United States in support of neither party filed. VIDED.
Aug 20 2014	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law in support of

	neither party filed. VIDED.
Aug 20 2014	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. VIDED.
Aug 20 2014	Brief amici curiae of North Carolina Litigants filed. VIDED.
Aug 20 2014	Brief amicus curiae of Brennan Center for Justice at N.Y.U. School of Law filed. VIDED.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, November 12, 2014. VIDED.
Sep 8 2014	Record requested from U.S.D.C. for Middle District of Alabama.
Sep 9 2014	The Record received from U.S.D.C. for Middle District of Alabama is electronic and located on PACER.
Sep 19 2014	CIRCULATED
Sep 24 2014	Application (14A335) to file a consolidated appellees' brief on the merits in excess of the word limit, submitted to Justice Thomas. VIDED
Sep 29 2014	Application (14A335) granted by Justice Thomas to file a consolidated appellees' brief on the merits in excess of the word limit provided that the brief does not exceed 22,500 words.
Oct 9 2014	Brief of appellees Alabama, et al. filed. VIDED. (Distributed)
Oct 15 2014	Motion for divided argument filed by appellants. VIDED.
Oct 15 2014	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae, and for divided argument filed. VIDED.
Oct 16 2014	Brief amici curiae of Speaker of the Alabama House of Representatives and President Pro Tempore of the Alabama Senate filed. VIDED. (Distributed)
Oct 16 2014	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED. (Distributed)
Oct 16 2014	Brief amicus curiae of Dalton J. Oldham filed. VIDED. (Distributed)
Oct 27 2014	Reply of appellants Alabama Legislative Black Caucus, et al. filed. (Distributed)
Oct 30 2014	Proposal of counsel for the appellees to lodge copies of the complaint in Figgs, et al. v. Quitman County, et al. VIDED
Oct 31 2014	Motion for divided argument filed by appellants GRANTED.
Oct 31 2014	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae, and for divided argument GRANTED and the time is to be divided as follows: 30 minutes for appellants, 30 minutes for appellees, and 10 minutes for the Solicitor General as amicus curiae. VIDED
Nov 12 2014	Argued. For appellants in 13-895: Eric Schnapper, Seattle, Wash. For appellants in 13-1138: Richard Pildes, New York, N. Y. For United States, as amicus curiae: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For appellees: Andrew L. Brasher, Solicitor General, Montgomery, Ala.
Jan 30 2015	Motion to file a supplemental brief after argument filed by appellants Alabama Legislative Black Caucus, et al. (Distributed)
Feb 23 2015	Motion to file a supplemental brief after argument filed by appellants GRANTED.
Feb 26 2015	Motion to file a supplemental brief after argument filed by appellees Alabama, et al. (Distributed)
Mar 9 2015	Motion to file a supplemental brief after argument filed by respondent GRANTED.
Mar 25 2015	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined. Thomas, J., filed a dissenting opinion.

JURISDICTIONAL STATEMENT

No. 13-895

In The

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS et al.,

Appellants,

v.

THE STATE OF ALABAMA et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state violates the requirement of one person, one vote by enacting a state legislative redistricting plan that results in large and unnecessary population deviations for local legislative delegations that exercise general governing authority over counties.

2. Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.

PARTIES

The following were parties in the Court below:

Plaintiffs in Civil Action No. 2:12-CV-691:
Alabama Legislative Black Caucus
Bobby Singleton
Alabama Association of Black County Officials
Fred Armstead
George Bowman
Rhondel Rhone
Albert F. Turner, Jr.
Jiles Williams, Jr.

Plaintiffs in consolidated Civil Action No. 2:12-CV-1081:
Demetrius Newton (deceased)
Alabama Democratic Conference
Framon Weaver, Sr.
Stacey Stallworth
Rosa Toussaint
Lynn Pettway

Defendants in Civil Action No. 2:12-CV-691:
State of Alabama
Jim Bennett, Alabama Secretary of State

Defendants in consolidated Civil Action No. 2:12-CV-1081:
State of Alabama
Robert J. Bentley, Governor of Alabama
Jim Bennett, Alabama Secretary of State

Intervenor-defendants:
Gerald Dial, Alabama Senator
Jim McClendon, Alabama Representative

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS ALABAMA LEGISLATIVE BLACK CAUCUS et al.

Appellants Alabama Legislative Black Caucus, Bobby Singleton, Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr., for themselves and all residents of Alabama counties whose boundaries have been split unnecessarily in the State's 2012 redistricting plan and all African-American voters of Alabama, appeal to the Supreme Court of the United States from the final judgment, J.S. App. 276-77, entered by the three-judge United States District Court for the Middle District of Alabama on December 20, 2013, dismissing or granting judgment in favor of the State Defendants on all the claims made by appellants. The final judgment from which this appeal is taken includes the issues advanced in appellants' earlier appeal to this Court, which was dismissed for want of jurisdiction. *Alabama Legislative Black Caucus v. Alabama*, ___ U.S. ___, 2013 WL 5410247 (Dec. 2, 2013).

OPINIONS BELOW

The December 20, 2013, memorandum opinion and order of the three-judge District Court majority (J.S. App. 1-187) and dissenting opinion of Judge Myron Thompson (J.S. App. 188-275) are reported at *Alabama Legislative Black Caucus v. Alabama*, ___

F. Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013). The August 2, 2013, opinion and order of the three-judge District Court majority (J.S. App. 278-339) are reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013), and the opinion of Judge Thompson concurring in part and dissenting in part (J.S. App. 340-407) is reported at ___ F. Supp.3d ___, 2013 WL 4102154 (M.D. Ala., Aug. 2, 2013).

Prior opinions in the consolidated actions are: the April 5, 2013, memorandum opinion and order of the three-judge District Court majority denying the ALBC plaintiffs' second motion for partial summary judgment (J.S. App. 408-36) and Judge Thompson's concurring opinion (J.S. App. 427-36), reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala., Apr. 5, 2013), reconsideration denied, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013); and the December 26, 2012, memorandum opinion and order denying the ALBC plaintiffs' motion for partial summary judgment regarding Count I of the original complaint and granting them leave to amend Count III (J.S. App. 437-53), reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F. Supp.3d ___, 2012 WL 6706665 (M.D. Ala. Dec. 26, 2012).

JURISDICTION

The final judgment denying all claims in these consolidated actions[1] was entered on December 20, 2013, J.S. App. 276-77. The Alabama Legislative Black Caucus plaintiffs filed their notice of appeal on January 6, 2014. J.S. App. 454-57. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, all reproduced at J.S. App. 458-62.

STATEMENT OF THE CASE

The drafters of Alabama's 2012 House and Senate redistricting plans violated the Equal Protection Clause of the Fourteenth Amendment in two fundamental ways: (1) they drew plans with the predominant purpose of maintaining the supermajority percentages yielded when 2010 census data were

[1] J.S. App. 6. Demetrius Newton, the lead plaintiff in the action consolidated with appellants' action, has died. This jurisdictional statement still refers to the "Newton plaintiffs," but the most recent District Court opinions call them the "Democratic Conference plaintiffs." *Id.* at 7.

overlaid on the 2001 majority-black districts, and (2) they completely ignored county boundaries in their pursuit of black population and in accommodating incumbents. In a split decision, the three-judge District Court rejected appellants' facial attack on both plans based on their indiscriminate splitting of county boundaries. J.S. App. 278-407. Because all House and Senate seats are up for election in the June 3, 2014, primary election, appellants filed an interlocutory appeal to assert the one-person, one-vote rights of county residents, but this Court dismissed that appeal for want of jurisdiction. *ALBC v. Alabama*, ___ U.S. ___, 2013 WL 5410247 (Dec. 2, 2013). Now that a final judgment on all issues has been entered, with another divided District Court decision, this time on the race issues, appellants are seeking to expedite this appeal so constitutional redistricting plans can be adopted in time for the June primary elections. The general election is November 3, 2014. The Alabama Legislature began its annual regular session on January 14, 2014.

A. Factual Background.

Local legislative delegations in Alabama, by longstanding custom, control the introduction and passage of local laws for their counties. Since Alabama was admitted to the Union in 1819, all six of its constitutions have treated counties as the central building blocks in creating state legislative districts. Those constitutions have required seats in the House of Representatives to be apportioned among the

counties in proportion to their populations, with each county entitled to at least one representative.[2] Senate districts, which are fewer than the number of counties, have also been apportioned among the counties, with the restriction that no county shall be divided among districts.[3]

Since adoption of the 1875 "Redeemer" Alabama Constitution,[4] the State has denied home rule to its counties in order to "guarantee[ ] the maintenance of white supremacy in majority-black counties." *Knight v. Alabama*, 458 F. Supp.2d 1273, 1284-85 (N.D. Ala. 2004), aff'd, 476 F.3d 1219 (11th Cir.), cert. denied, 127 S.Ct. 3014 (2007) (citation omitted).[5] It has done so by concentrating in the white-controlled state

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[2] 1819 Constitution of Alabama, Art. III, § 9; 1861 Constitution of Alabama, Art. III, § 9; 1865 Constitution of Alabama, Art. IV, § 6; 1868 Constitution of Alabama, Art. VIII, § 1; 1875 Constitution of Alabama, Art. IX, §§ 2-3; 1901 Constitution of Alabama, Art. IX, §§ 198, 199. The text of all six constitutions can be accessed at http://www.legislature.state.al.us/misc/history/constitutions/constitutions.html.

[3] 1819 Constitution of Alabama, Art. III, §§ 10-11; 1861 Constitution of Alabama, Art. III, §§ 10-11; 1865 Constitution of Alabama, Art. IV, § 7; 1868 Constitution of Alabama, Art. VIII, § 3; 1875 Constitution of Alabama, Art. IX, §§ 4; 1901 Constitution of Alabama, Art. IX, § 200.

[4] The Redeemer Constitution "redeemed . . . white rule." *Knight v. Alabama*, 787 F. Supp. 1030, 1070 (N.D. Ala. 1991), aff'd in relevant part, 14 F.3d 1534 (11th Cir. 1994).

[5] *See generally*, Will Parker, *Still Afraid of "Negro Domination?": Why County Home Rule Limitations in the Alabama Constitution of 1901 Are Unconstitutional*, 57 ALA. L. REV. 545, 557 (2005).

legislature powers exercised by county governments in many other states. Local legislative delegations have ruled their counties since the nineteenth century.[6]

County commissions lack the power to enact their own laws. Instead, local legislation originates with members of a county's local state legislative delegation, which is composed of those House and Senate members whose districts include all or part of a county. August 2, 2013, majority op., J.S. App. 281; *id.* at 341-44 (Thompson, J., dissenting). The local legislative delegation must approve any bill before it can proceed in committee or to the floor of the House or Senate. *Id.* at 281-82. In some county delegations, local bills are approved by majority vote, while unanimity is required in other county delegations. *Id.* On the floor of the House and Senate, local bills approved by a county's delegation are often uncontested as a matter of local courtesy. *Id.* Local courtesy is a matter of informal custom, rather than a formal rule. *Id.*

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[6] "In the words of a delegate to the Alabama Constitutional Convention of 1901, the lawmaker was a 'czar' who had 'dictatorial powers about every matter of legislation that affects his county. . . . He possessed 'absolute and undisputed power to control all legislation affecting his locality or county.'" Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 274 (2004) (footnote omitted).

1. Alabama's History of Redistricting.

From 1819 to 1974 no county was split between House or Senate districts.[7] But after this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), required Alabama to create equipopulous state legislative districts, it became impossible to comply completely with the prohibition on splitting counties.

In the next several redistricting efforts, the state generally adhered as much as possible to its constitutional commitment to county integrity. In 1965, on remand from this Court's decision in *Reynolds*, a three-judge district court held that the longstanding whole-county provisos for House and Senate districts in the Alabama Constitution should remain operative "so far as practicable," giving way only where their application brings about "an unavoidable conflict" with the one-person, one-vote rule. *Sims v. Baggett*, 247 F. Supp. at 101-03. The district court approved plans which did not split a single county between districts, a result achieved by employing multi-member districts. *Id.* at 105-09. Two black House members were elected in 1970, the first African Americans to serve in the Alabama Legislature since

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[7] *Sims v. Baggett*, 247 F. Supp. 96, 103 (1965) (three-judge court). Maps of the whole-county districts from which members of the Alabama House and Senate were elected from 1819 to 1962 can be viewed on the web site of the Alabama Archives. http://www.archives.alabama.gov/legislat/ala_maps/getstart.html (last visited Dec. 29, 2013).

Reconstruction. Dec. 20, 2013, majority op., J.S. App. 3.

After the 1970 census, a three-judge district court ordered the first single-member district plans for the House and Senate, but delayed their implementation until the 1974 regularly scheduled elections. *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala.) (three-judge court), aff'd, 409 U.S. 942 (1972). These first single-member district plans "cross[ed] county lines in as few instances as possible." 336 F. Supp. at 937. County boundary lines were "sacrificed only where absolutely necessary to satisfy the constitutional requirement of one man one vote," as it applied to court-ordered plans. *Id.* at 938-39. In the 1974 elections, 13 African Americans were elected to the House, and the first two African Americans were elected to the Senate. APX 81.

In 1982 the Alabama Legislature adopted a redistricting plan to which the Attorney General objected under Section 5 of the Voting Rights Act, because "the configuration of certain Black Belt districts caused retrogression of black voting strength . . . and . . . there was . . . insufficient adherence to county boundaries." *Burton v. Hobbie*, 561 F. Supp. 1029, 1035 (M.D. Ala. 1983) (three-judge court). The three-judge court observed the plan was "impermissible under Ala. Const. art. IX, §§ 198, 199 & 200 because of its disregard for the integrity of county lines. Boundaries of thirty counties were unnecessarily split by the plan." *Id.* The Legislature crafted a new plan in 1983, which the three-judge court accepted because

it "conform[ed] closely to county lines, splitting no more than thirteen of Alabama's 67 counties; the total population deviation among House districts [was] 10.86% and among Senate districts [was] 9.63%." *Id.* at 1035 and nn.13-14. Under these plans 17 African Americans were elected in the House, and 3 were elected in the Senate. J.S. App. 3.

Following the 1990 census, when the Legislature failed to enact a redistricting plan, a state court entered a consent decree approving a plan that split nearly twice as many counties as did its predecessor. *See Kelley v. Bennett*, 96 F. Supp.2d 1301, 1311 (M.D. Ala.) (three-judge court) (describing the plan), rev'd on other grounds sub nom. *Sinkfield v. Kelley*, 531 U.S. 28 (2000). These plans contained 27 majority-black House districts and 8 majority-black Senate districts. J.S. App. 3-4.

Following the 2000 census, the Alabama Legislature enacted House and Senate redistricting plans that received Section 5 preclearance, preserving the 27 majority-black House districts and 8 majority-black Senate districts. *Montiel v. Davis*, 215 F. Supp.2d 1279, 1282 (S.D. Ala. 2002) (three-judge court); J.S. App. 4.

2. The 2012 Redistricting.

a. The Disregard of County Boundaries.

The redistricting plans adopted after the 2010 census virtually ignored county boundaries throughout the state, thereby creating a set of local legislative delegations whose members represent vastly different numbers of constituents. The House plan enacted by the Legislature in 2012 splits 50 of Alabama's 67 counties, and the Senate plan splits 33 counties. J.S. App. 57. The division of counties in these plans was aggravated by the Legislature's decision to adopt an unprecedented requirement of ±1% maximum population deviation among the districts. J.S. App. 57, 90. That decision required significantly more county splitting than would have been required by this Court's precedents. Measured by the guideline provided by this Court that total population deviations under ten percent constitute prima facie compliance with the one-person, one-vote rule, the Legislature's House plan splits 44 counties more than are necessary, including 22 counties small enough to be completely contained within one House district and 7 counties that could be divided into two or more complete House districts. Amended compl., Doc. 60 at 11. The Legislature's Senate plan splits 31 counties more than are necessary to satisfy the one-person, one-vote requirement, including 26 counties small enough to be completely contained within one Senate district and one county that could have been divided into three complete Senate districts. Doc. 60 at 11-12.

The House and Senate districts are littered with mere fragments of counties. House District 43, contains only 224 Jefferson County residents, or 0.49% of the total district population, with the rest residing in Shelby County. Aug. 2, 2013, dissenting op., J.S. App. 369; APX 25. Even more egregious is House District 61, which contains only 12 residents of Greene County (0.03%), at 9,045 the least populous county in the state. J.S. App. 57; APX 19, 25. Altogether there are 11 instances of House districts containing residents of a county who constitute less than 5% of the district population, and 27 instances where they constitute 10% or less of the district population. APX 25. In the Senate plan, there are 14 similar instances below 5% and 29 similar instances below 10%. APX 26.

The upshot of this apportionment, for example, is that the 12 residents of Greene County in House District 61 elect one member of the Greene County local legislative delegation, as do the 4,159 Greene County residents in House District 71 and the 4,874 Greene County residents in House District 72. APX 25. The following table shows the full impact of these splits on Greene County's House Delegation:

Counties Whose Residents Will Vote for Members of the Greene County House Delegation

See APX 15, 44. Ideal House district = 45,521. J.S. App. 17.

County	House Districts That Split Greene County	Population in These House Districts
Greene County	HD 61, 71, 72	9,045
Pickens County	HD 61, 71	19,746
Tuscaloosa County	HD 61, 71	49,228
Hale County	HD 72	15,760
Perry County	HD 72	9,333
Bibb County	HD 72	6,280
Marengo County	HD 71, 72	9,156
Choctaw County	HD 71	3,461
Sumter County	HD 71, 72	13,763
Total		135,772

Another example of violating county residents' equal voting rights for members of their local legislative delegation concerns Jefferson County, at 658,466 the most populous county in Alabama. APX 19. The plans introduced by ALBC members demonstrated that, within ± 5% deviation, 14 House districts could be drawn for Jefferson County, none of them crossing the county boundaries and nine of them majority-black. Doc. 60 at 44. Six Senate districts could be drawn for Jefferson County, three of

them majority-black, with only one majority-white Senate district crossing the county boundary. *Id.* Instead, the Legislature enacted plans that place Jefferson County in 18 House districts, only 8 of them majority-black. J.S. App. 64. All of the majority-black districts lie entirely inside Jefferson County, but six of the ten majority-white districts cross into six other counties. Doc. 60 at 42. The 2012 Senate plan puts Jefferson County in eight districts, three majority-black and five majority-white. All three of the majority-black Senate districts lie entirely inside Jefferson County, but all five of the majority-white districts cross the Jefferson County boundary to include parts of 11 other counties. *Id.* at 43. Altogether, 155,279 nonresidents vote for members of Jefferson County's House delegation, and 428,101 people residing in other counties vote for members of the Jefferson County Senate delegation. *Id.* at 42-43.

b. The Adoption of Racial Targets or Quotas.

The drafters[8] began mapping with the majority-black districts, J.S. App. 34, and the extraordinary lengths to which they went to maintain their inflated majority-black percentages had a "domino" impact on

[8] Sen. Gerald Dial and Rep. Jim McClendon, Chairpersons of the Permanent Legislative Committee on Reapportionment, J.S. App. 10, and Randy Hinaman, their consultant. *Id.* at 31.

the whole state.[9] Feeling unimpeded by county boundaries or any other traditional districting criteria,[10] they scoured the map to grab enough black precincts or census blocks to add over 100,000 more black residents needed to maintain the black percentages yielded by laying 2010 census data on the severely underpopulated 2001 majority-black districts. J.S. App. 57, 148-51. The arbitrary 2% maximum population deviation restriction made it even harder to find enough black population to meet these targets. *Id.* at 53. But the drafters were open and unapologetic about making this nakedly racial project their primary objective. They believed that attempting to "guarantee" the ability of blacks to elect their candidates of choice provided the drafters a "safe harbor" under Section 5 of the Voting Rights Act.[11]

The geographic dispersal of black population made it impossible to hit the racial target in every district, but the drafters tried to come "as close to it as we could get," Doc. 125-3 at 17, J.S. App. 33, and

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[9] J.S. App. 62, 97-98; defendants' post-trial brief, Doc. 196 at ¶ 146; defendants' summary judgment brief, Doc. 125 at ¶ 26 (citations omitted).

[10] Defendants' summary judgment brief, Doc. 125 at ¶¶ 42-43, 90. Sen. Dial blamed the wholesale division of counties on the Voting Rights Act. Testimony of Sen. Dial, 08-08-13 Tr. at 91. Rep. McClendon believed that because of federal court cases and guidelines "[t]here is no requirement to respect county boundaries." McClendon quoted in press, APX 58 at 2.

[11] Doc. 125 at ¶ 30; Doc. 125-3 at 120; defendants' post-trial brief, Doc. 196 at ¶ 82.

they met or exceeded their goals in most districts, as the following tables show:

Comparison of Majority-Black House Districts in 2001 and 2012 plans using 2010 census data and% Black total population (from APX 6)

House District	% Black 2001 plan	% Black 2012 plan	Difference
19	70.04	61.5[12]	-8.54
32	59.62	60.3	0.68
52	60.09	60.1	0.01
53	55.71	56.2	0.49
54	56.77	56.9	0.13
55	73.54	73.6	0.06
56	62.26	62.3	0.04
57	68.49	68.5	0.01
58	78.08	73.0	-5.08
59	67.04	76.8	9.76
60	67.63	67.9	0.27
67	69.14	69.2	0.06
68	62.50	64.6	2.1
69	64.11	64.2	0.09

[12] House District 19 was the sole majority-black district in Madison County in the 2001 plan, and the size of its black majority necessarily decreased when majority-black HD 53 was moved from Jefferson County to Madison County.

70	61.89	62.2	0.31
71	64.28	66.9	2.62
72	60.12	64.5	4.38
76	69.56	73.9	4.34
77	73.58	67.0	-6.58
78	74.34	70.2	-4.14
82	57.18	62.2	5.02
83	57.03	57.7	0.67
84	50.67	52.4	1.73
97	60.73	60.8	0.07
98	65.23	60.0	-5.23
99	73.45	65.7	-7.75
103	69.90	65.3	-4.6

Comparison of Majority-Black Senate Districts in 2001 and 2012 plans using 2010 census data and% Black total population (from APX 7)

Senate District	% Black 2001 plan	% Black 2012 plan	Difference
18	59.93	59.12	-0.81
19	71.65	65.39	-6.26
20	77.96	63.38	-14.58
23	64.79	64.81	0.02
24	62.82	63.30	0.48

26	72.75	75.22	2.47
28	51.05	59.96	8.91
33	64.89	71.71	6.82

In HD 52 the drafters came within two persons of hitting their target, within 12 persons in HD 56, and within 13 persons in HD 55. Dec. 20, 2013, dissenting op., J.S. App. 208. The plans were enacted over the objections of every black legislator. *Id.* at 209.

The drafters "filled in the blanks around [the majority-black districts] with what was left of the districts." Sen. Dial dep., Doc. 125-3 at 19-20. They did so by "tr[ying] to accommodate the wishes of legislators where possible." J.S. App. 104. "Where the Republican legislators agreed upon boundaries and those particular boundaries did not pose a problem for either the requirement of one person, one vote or for the preservation of the majority-black districts, [the consultant] accommodated those requests." *Id.* at 100.

The Department of Justice precleared these plans. J.S. App. 8. But the target- or quota-driven packing of the majority black districts necessarily increases the political segregation of African Americans and reduces their ability to influence the outcome of legislative elections in the rest of the state. The black-white margins in the majority-white districts are substantially greater in the plans enacted by the Legislature than they are in the plans introduced by members of the Legislative Black Caucus,

APX 72 and 73, and in the 2001 plans, APX 129; J.S. App. 89-90.

B. Procedural History.

Appellants ALBC *et al.* commenced this action on August 13, 2012. They alleged Alabama's redistricting plans violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. An amended ALBC complaint was filed January 15, 2013. Doc. 60; J.S. App. 8-10.

Count I alleged the 2012 plans violate the three-judge District Court's ruling on remand from *Reynolds v. Sims* that the Alabama constitutional provisions prohibiting the division of counties among House and Senate districts remain operative except where they conflict with the federal constitutional requirement of achieving equal population to the extent practicable. *Sims v. Baggett*, 247 F. Supp. 96, 101 (1965) (three-judge court). On cross-motions for partial summary judgment and for judgment on the pleadings, the District Court dismissed Count I, holding that splitting counties by narrowly restricting permissible population deviations does not violate federal constitutional law and that federal courts lack subject-matter jurisdiction to enforce the whole-county provisions of a state constitution. J.S. App. 9, 443.

Count II of the amended complaint alleged that the systematic packing of the majority-black House

and Senate districts diluted black voting strength statewide, racially classifying and segregating black voters and their elected representatives in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

Count III of the amended complaint alleged that Alabama's plans constituted an impermissible political gerrymander: for partisan reasons, the state had unnecessarily split county boundaries and deviated from principles of one person, one vote in local legislative delegations.

1. Proceedings Regarding Count III.

Appellants moved for partial summary judgment and for entry of a preliminary and permanent injunction on Count III of the amended complaint, contending the wholesale disregard of county boundaries in the State's House and Senate plans violates the one-person, one-vote rights guaranteed county residents by the Equal Protection Clause. Doc. 68-1. On March 27, 2013, the District Court denied that motion without stating its reasons. Doc. 89. In response to appellants' motion for reconsideration, on April 5, 2013, the court vacated its March 27 order and substituted a memorandum opinion and order explaining its decision. J.S. App. 408-36. Judge Thompson filed a concurring opinion that found potential merit in plaintiffs' contention "that the local-delegations system results in inequalities of representation and power among county voters," J.S. App. 430, but he

suggested that appellants needed to clarify the basis for this claim. *Id.* at 434.

Subsequently, the state defendants moved for partial summary judgment on Count III of the amended complaint. Doc. 98. Appellants responded by opposing the State defendants' motion and by moving both for reconsideration of their motion for partial summary judgment, Doc. 107, and for entry of a permanent injunction. Doc. 108.

Following a hearing, the three-judge court *sua sponte* directed the parties to file supplemental briefs addressing the ripeness of the county one-person, one-vote claim and the standing of appellants to advance them. Doc. 130. Defendants' supplemental brief seized upon the District Court's suggestion that the Legislature might somehow change its internal operating procedures to do away with the local delegation system. Doc. 132. The ALBC plaintiffs' supplemental brief pointed out that the gatekeeping and local courtesy customs that empower local legislative delegations are not subject to change by House and Senate rules and, since they have been in use since the nineteenth century, are not likely to be abandoned. Doc. 133.

2. The District Court's Disposition of Count III.

A divided three-judge court on August 2, 2013, granted defendants' motion for summary judgment, dismissed the ALBC plaintiffs' one-person, one-vote

equal protection claim for county residents, and denied as moot appellants' motion for entry of a permanent injunction. J.S. App. 278-339, 2013 WL 3976626.

The majority acknowledged that a "significant" part of the business of the Alabama Legislature is passing local laws, that legislators are members of the local delegation for every county any portion of which is included in the House or Senate district they represent, that each local bill affecting a county must be approved by that county's local delegation before it can move to committee or to the floor, and that, even though no rules require it, a local bill approved by a county's local delegation usually is uncontested by the rest of the Legislature. J.S. App. 280-82, 323. But it held that the one-person, one-vote claim for county residents was not ripe for adjudication solely "[b]ecause we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured. . ." J.S. App. 300.

For the same reason, the majority held that the ALBC appellants had failed to establish injury-in-fact because they could not prove that the next Legislature would not disestablish the local delegation system. *Id.* at 305-06. Finally, the majority held that the ALBC appellants had not demonstrated redressability, because no redistricting plans could comply with their one-person, one-vote rights both as residents of the state and as residents of their counties. *Id.* at 310-13. Believing that "a failure to comply

with the requirement of one person, one vote is not the sort of injury that can be redressed by partial compliance," *id.* at 312, it advised appellants to wait until the 2015 Legislature has convened and then to sue the officers of the Legislature seeking to enjoin continued use of the local delegation system. *Id.* at 314.

The District Court majority then ruled in the alternative that the one-person, one-vote county resident claim should be rejected on the merits. It held itself bound by an earlier Eleventh Circuit decision, *DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir. 2002), cert. denied, 537 U.S. 948 (2002), which had rejected a challenge to the Georgia Assembly's local delegation customs, similar to the claim the majority would have the ALBC appellants make in 2015. Unlike the ALBC appellants, the *DeJulio* plaintiffs did not challenge a state legislative apportionment. Instead, they asked the federal court to enjoin the legislature's internal practices. The Eleventh Circuit held that, because the Georgia Assembly had the ultimate discretion to adopt local laws or to overrule local bills approved by county delegations, the local delegations were not engaged in "governmental functions" that subject them to the one-person, one-vote requirement of the Equal Protection Clause. 290 F.3d at 1295. The District Court majority here considered itself bound to hold that the one-person, one-vote requirement does not apply to Alabama's local delegation system because, as with *DeJulio*, the local

legislative delegation system is not governed by formal rules of the Legislature. J.S. App. 323.

Judge Thompson dissented from the dismissal of the equal protection claim. J.S. App. 340-407, 2013 WL 4102154. He emphasized that local legislative delegations in Alabama "are generally creatures of custom" and "are the single most important legislating bodies for [the] counties." *Id.* at 344. He found the ALBC appellants' one-person, one-vote claim ripe for adjudication. *Id.* at 347-60. "The evidence overwhelmingly indicates that the Local Delegations system will almost certainly continue to exist with Alabama's next Legislature and the material aspects of the delegations will be the same as they are today, the same as they were last century, the century before that, and as far back as anybody involved in this litigation knows." *Id.* at 357-58. Particularly because the ALBC appellants wanted to preserve the local delegation system as a way of dampening the purposefully discriminatory centralization of power effected by the white supremacist 1875 and 1901 Alabama Constitutions, the majority's suggestion that the appellants should wait until the Legislature came back in session in 2015 and then attack the local delegation system misconceived the gravamen of appellants' claim. Properly understood, appellants had both suffered an injury caused by the new plan and had satisfied the redressability prong of Article III standing. *Id.* at 360-65.

On the merits, Judge Thompson's dissenting opinion identified at least four ways in which "Alabama's

Local Delegations system creates clear differences of voting power among the State's citizens." J.S. App. 367-68. First, among citizens of the same county, those who reside in a district only partially located in the county have numerically greater voting strength in the county delegation than do citizens whose district is contained entirely inside the county. *Id.* at 368-69. Second, among voters, those who reside in House or Senate districts that contain more than one county can "influence the local legislative affairs of their neighbors in other counties, although those cannot do the same for them." *Id.* at 371. Third, in districts that split counties, nonresidents are allowed "to influence a governmental body that they have no legitimate interest in (say, the Jefferson County Local Delegation), thereby diluting the votes of the legitimately interested voters." *Id.* at 372-73. "A quick look at the State's redistricting plans reveals that, across the State, residents of numerous counties are authorized, through their representatives, to legislate for other, neighboring, and, in many cases, even distant, counties." *Id.* at 374. Finally, among legislators, those whose districts include residents of multiple counties become "gatekeepers" for several counties, giving them more power than can be exercised by House or Senate members whose districts include fewer counties. *Id.* at 369-70. Judge Thompson concluded that "Alabama's Local Delegations scheme, which irrationally empowers certain of the State's citizens to the disadvantage of others, violates the equal protection clause." *Id.* at 378.

3. Proceedings Regarding Count II.

Trial was held August 8, 9, 12, and 13, 2013, before the three-judge District Court on the ALBC and Newton plaintiffs' race claims. J.S. App. 11-12. Before trial began, on June 25, 2013, this Court held that Alabama did not have to comply with Section 5 of the Voting Rights Act. *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). The defendants in these consolidated actions stood by their position that Section 5 provided a compelling state interest that justified maintaining supermajority targets in the majority-black districts as a controlling factor in drawing the 2012 House and Senate plans. Defendants' post-trial brief, Doc. 196 at 83; J.S. App. 12-13. The State persisted in its mistaken view that, to comply with Section 5, "trying to make sure that the minority voting strength in those black-majority districts remained at or about the same level as it was when the 2010 Census data were loaded into the 2001 legislative district lines and in the 2001 districts was not unreasonable or demonstrably incorrect." Doc. 196 at 85. The State made no attempt to show that the inflated black population percentages in its targets or quotas were necessary to provide black voters the ability to elect candidates of their choice.

4. The District Court's Disposition of Count II.

The District Court majority accepted the State's arguments and expanded on them to uphold the 2012

House and Senate plans. It agreed that the drafters began by drawing the majority-black districts, J.S. App. 34, and that they tried to maintain "as closely as possible" the black percentages in the 2001 districts with 2010 census data, *id.* at 33. It found that the tighter 2% maximum deviation restriction made the black percentages higher than they had been in the 2001 plans. *Id.* at 52. The search for additional black population "drove the development of the Acts," *id.* at 103, and had a "domino" effect on majority-white districts throughout the state. *Id.* at 62, 97-98; accord, *id.* at 232 (Thompson, J., dissenting) ("seeking to achieve the racial quotas drove everything"). But, held the majority, "[a]though race was a factor in the creation of the districts, we find that the Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations." *Id.* at 143. It said the consultant "ably balanced" all objectives, *id.* at 147, and "the constitutional requirement of one person, one vote trumped every other districting principle." *Id.* at 151. The majority conceded, however, "that the 'first qualification' after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them." *Id.* at 149 (quoting Rep. McClendon). The integrity of county boundaries was conspicuously missing from the objectives listed in the majority opinion. *Id.* at 146-47.

In the alternative, and notwithstanding the drafters' repeated denials of partisan motives, J.S. App. 216-17 (Thompson, J., dissenting) (citations

omitted), the District Court majority found "that partisanship explains what happened here," not race. J.S. App. 161. If the sizes of black majorities were inflated, the majority said, that was the fault of the Democratic-controlled legislatures that had drawn the previous plans. *Id.* at 161-62. "We refuse to apply a double standard that requires the Legislature to follow one set of rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it." *Id.* at 163.

Even if race was the predominant factor, the majority held, the State's compliance with Section 5 of the Voting Rights Act was a compelling state interest, J.S. App. 173, and the plans were narrowly tailored to meet this interest, because any significant reduction of the percentages in the majority-black districts would have violated Section 5. *Id.* at 183. This was Congress' intent, the majority thought, when it amended Section 5 in 2006 to prohibit any diminishment in a minority's ability to elect its preferred candidates. *Id.* at 181. And, it concluded, this was the legal standard by which the 2012 House and Senate plans should be judged, because Alabama was subject to Section 5 when those plans were enacted. *Id.* at 175-76.

The District Court majority also rejected the ALBC and Newton plaintiffs' claims of racial discrimination. For example, it dismissed as nonjusticiable, for the reasons set out in its August 2, 2013, opinion and order, the claim that the plans diluted the votes

of black residents of Jefferson County for members of their local delegation. J.S. App. 115-16.

Dissenting, Judge Thompson said the drafters' policy of maintaining the 2010 census percentages in the 2001 majority-black districts, on which they focused "[f]rom start to finish," J.S. App. 214, "sifted residents by race" to achieve "naked 'racial quotas.'" *Id.* at 189 (quoting *Bush v. Vera*, 517 U.S. 952, 976 (1996)). He cited legislative history, controlling case law, and Department of Justice regulations to show that the State's reliance on the 2006 amendments to Section 5 of the Voting Rights Act to justify these racial quotas was wrong. *Id.* at 243-67. Congress did not intend to create a "one-way ratchet" that froze black percentages in place. *Id.* at 253. Determining whether a new redistricting plan diminishes a protected minority's ability to elect its favored candidates cannot depend solely on population statistics. It requires a "functional analysis" of all relevant factors, including "minority voter registration, minority voter turnout, election history, and minority/majority voting behaviors." *Id.* at 259-60 (quoting *Texas v. United States*, 887 F. Supp.2d 133, 263 (D. D.C. 2012) (three-judge court), vacated and remanded on other grounds, 133 S.Ct. 2885 (2013)).

Judge Thompson pointed out that the State's exclusively census-based interpretation of Section 5 "by definition raises a serious constitutional question," as this Court warned in *Miller v. Johnson*, 515 U.S. 900, 923 (1995). J.S. App. 261-62. It creates racial classifications that require strict scrutiny. *Id.*

at 189, 231. And here, Judge Thompson said, the State has not met its burden to establish a "strong basis in evidence" that it needed to draw districts that preserved these racial quotas. *Id.* at 265. "The conclusion is as clear as day: the drafters' action was not required under any correct reading of the statute, and so cannot survive as narrowly tailored." *Id.* at 267.

Even if the districts had been narrowly tailored to satisfy Section 5, Judge Thompson wrote, the *Shelby County* decision removed Alabama's obligation to comply with Section 5, so that statutory provision no longer provides the State a purported compelling interest for its racial classification of voters. J.S. App. 267-69. "In the absence of an actual compelling interest at the time of judgment, the court cannot approve a racial gerrymander." *Id.* at 269.

Because race was the "overriding consideration" for the entire plans, *id.* at 271, so that the Legislature should be required to draw completely new plans that respect county boundaries and other good districting criteria "based *far less on race*," J.S. App. 274 (emphasis in original), Judge Thompson did not reach the claims of racial discrimination. *Id.* at 271.

REASONS FOR NOTING PROBABLE JURISDICTION

Alabama's 2012 House and Senate redistricting plans epitomize the worst evils this Court has tried to

guard against since it entered the "political thicket" of legislative redistricting. *Reynolds v. Sims*, 377 U.S. at 566. Instead of starting the process with county boundaries that should be the basic building blocks of every redistricting plan, boundaries Alabama's own constitution forbids its Legislature to fragment, and that protect the one-person, one-vote rights of residents electing their county legislatures, the drafters began and ended their work trying to maintain arbitrary black supermajorities, an explicit and unapologetic classification of voters by race that violates the core principles of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. This Court should note probable jurisdiction and expedite this appeal to restore rationality and basic fairness to the House and Senate districts before Alabama's voters go to the polls in June.

I. The Unnecessary Division of Counties Among Legislative Districts Violates the One-Person, One-Vote Rights of County Residents.

This appeal raises a question of first impression before this Court: how are the bedrock principles of one-person, one-vote to be applied when a state chooses a system of government where local delegations in the state legislature also exercise general governmental power at the county level? This Court has long recognized an inherent tension between the requirement of equal population among state legislative districts and respect for county boundaries.

Reynolds v. Sims, 377 U.S. 533, 580-84 (1964). The tension is most acute in states like Alabama, where local legislative delegations, operating under long-standing customs of local courtesy, are "the single most important legislating bodies for [their] counties." J.S. App. 344. Local legislative delegations are especially prevalent in the South, where, as in Alabama, they grew out of efforts to deny African Americans the power to control or influence their county governments.[13]

This Court has long emphasized the preservation of county boundaries as one of the "traditional districting principles" that constrain what might otherwise be the unbridled power of plan drawers to choose districts that undercut fair representation for all citizens. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997), and *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Mahan v. Howell*, 410 U.S. 315, 325 (1973). Most recently, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), this Court held that states cannot use federal law as a smokescreen for violating state constitutional "whole county" requirements. North Carolina could not justify violating its whole-county requirement by pointing to Section 2 of the Voting Rights Act of 1965,

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[13] Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 121 (1992). Local legislative delegations remain active in Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina. *Id.* at 109 n.23.

unless Section 2 required the creation of a district with a majority-black voting-age population. But *Bartlett* did not involve – and this Court had no need to consider – whether splitting Pender County violated the federal one-person, one-vote rights of county residents as well as the state constitution. Particularly in light of this Court's difficulties identifying standards to constrain rampant partisanship in the redistricting process, *see, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this appeal presents an opportunity for this Court to clarify that states cannot arbitrarily violate traditional districting principles, at least when those violations also produce massive inequalities in voting power for local legislative delegations possessing general governmental powers over their respective counties.

1. The court below erred in holding that the ALBC appellants' challenge was not ripe and that they lacked Article III standing. Because the House and Senate rules do not affect the local delegations' customary gatekeeping function or the informal courtesy other legislators usually extend to the local bills approved by county delegations, the impact the local delegation system will have on the one-person, one-vote rights of county residents is not "[a] hypothetical threat." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1947). The equal protection claim does not rest on contingent events that may never occur. *Texas v. United States*, 523 U.S. 296, 300 (1998). To the contrary, the District Court majority's suggestion that the rules of the Legislature

could somehow do away with the informal local delegation system rests on events not just hypothetical and contingent but counter-factual and unrealistic. Not a single legislator testified the majority's revolutionary proposal is even possible. J.S. App. 353 (Thompson, J., dissenting). Nor did the majority suggest how the operation of county delegations could be rooted out of the statute laws in which they are embedded. *Id.* at 344-46, 357.

If the June 2014 primary elections are allowed to proceed under the challenged plans, the hardship suffered by residents of counties unnecessarily divided among House and Senate districts will be the denial of "one of the most fundamental rights of our citizens: the right to vote," *Bartlett v. Strickland*, 556 U.S. at 10, in this case the constitutional right to an equal and undiluted vote for the members of their county delegations. There is no more serious hardship than that. The ALBC appellants' equal protection claim is not only ripe for review, it requires this Court's urgent attention.

The District Court majority's denial of Article III standing turns on two misconceptions: (1) that the ALBC appellants' real beef is with the informal system of local delegations, and (2) that anything done in the next organizational session of the Legislature can prohibit members of the House and Senate from continuing their customs of deference to local delegations. When the one-person, one-vote claim is viewed correctly, the appellants' Article III standing is evident. Their injury-in-fact – the dilution of county

residents' votes for their local legislative delegation – is fully materialized in the 2012 redistricting statutes. Appellants' injury is directly traceable to the county-blasting districts that unnecessarily allow nonresidents to elect members of county delegations. The one-person, one-vote violations would be redressed by the requested injunction, which would prohibit enforcement of the challenged statutes and require the District Court to order its own House and Senate plans in effect if the Legislature failed timely to enact new plans that split counties between districts only where necessary to satisfy substantial statewide equality of district populations.

2. On the merits, the court below erred in rejecting the ALBC appellants' one-person, one-vote claims. By analogizing them with the claims advanced in *DeJulio v. Georgia*, 127 F. Supp.2d 1274 (N.D. Ga. 2001), aff'd, 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002), and *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), the majority misconceived appellants' constitutional claim. It is *not* that the system of local legislative delegations violates appellants' rights. To the contrary, as the majority acknowledged, J.S. App. 311, appellants have argued that, absent local delegations, the State's system of government would be *less* fair and representative, particularly in counties with heavily African-American populations. Rather, appellants' claim is that the decision to create local legislative delegations whose members represent vastly different numbers of constituents, and to give voters in different counties across the state vastly different voting

power selecting and influencing the members of local legislative delegations, violates fundamental principles of one person, one vote that cannot be excused by a state's decision to adopt redistricting principles not required by federal law.

Lawmaking is the original, quintessential "governmental function" that requires that the election of a public body comply with the Equal Protection Clause, *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970). In Alabama local legislative delegations are the *de facto* lawmakers for their respective counties. When it comes to the equal protection rights of voters, this Court has repeatedly held that "the Equal Protection Clause reaches the exercise of state power *however manifested*, whether exercised directly or through subdivisions of the State." *Avery v. Midland County*, 390 U.S. 474, 479-80 (1968) (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)) (emphasis added). The Constitution imposes "one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." *Avery*, 390 U.S. at 485-86. The exceptions to this rule – in cases like *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981) – involve governmental bodies with limited powers far removed from the core functions exercised by local legislative delegations in Alabama. That Alabama has chosen to use local legislative delegations as the

county lawmaking body cannot relieve it of its constitutional duties. While the Eleventh Circuit may have reached the right result in *DeJulio* when it held that the one-person, one-vote rule does not authorize federal courts to interfere with a legislature's internal allocation of powers among its members, it was wrong to base its holding on the patently erroneous conclusion that Georgia's local legislative delegations were not exercising governmental functions.

This Court has held that when officials become members of a body exercising local governmental powers "as a matter of law upon their various elections" to other offices "ultimately . . . selected by popular vote," the principle of one person, one vote applies. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989). The requirements of one person, one vote apply to the equal power exercised by *voters* in the affected local political subdivisions. "No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of substantial voter equality." 489 U.S. at 692-93 (citing *Avery*, 390 U.S. at 481, and *Hadley*).

Ordinary citizens have no difficulty understanding why it is unfair to allow voters in other counties to influence and even to control their local laws, as speakers at the Legislature's public hearings, including the co-chair of the Legislative Reapportionment Committee, repeatedly complained. J.S. App. 95, 374-75. Related decisions of this Court support

the common-sense conclusion that, at least where it can be avoided, allowing strangers to elect county lawmakers violates equal protection. "No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions." *Holt Civic Assn. v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978). The extraterritorial impact of one county's local laws, for example, a sales tax, which must be paid by residents and nonresidents alike, is not a constitutionally sufficient justification for allowing nonresidents to vote for that county's local delegation. *Id.* at 69.

The court below further erred in rejecting appellants' claim because it thought they had failed to define with sufficient precision exactly when population deviations affecting local legislative delegations might be excused by the need to comply with federal constitutional or statutory requirements for the legislature as a whole. J.S. App. 315-16. This Court has repeatedly emphasized since *Reynolds* that it is impossible to provide a bright-line definition of exactly when population deviations are "necessary to achieve some legitimate state objective," *Tennant v. Jefferson County Comm'n*, 133 S.Ct. 3, 5 (2012), or when their conflict with other state or federal districting standards is "unavoidable," *Brown v. Thomson*, 462 U.S. 835, 843 (1983), or when population equality has been achieved as nearly as "practicable," *Connor v. Finch*, 431 U.S. 407, 419 (1977). This Court has held that a total population deviation of less than ten

percent constitutes prima facie compliance with one person, one vote and need not be justified by the state absent evidence of arbitrariness or discrimination. *Brown v. Thomson*, 462 U.S. at 842 (citations omitted). The Alabama Legislature's imposition of an arbitrary ±1% restriction on all House and Senate districts systematically increased the instances in which county residents' votes are diluted, and it cannot be justified by this Court's precedents any more than North Carolina's decision to ignore its whole-county provision in *Bartlett* could be justified by invoking the Voting Rights Act. As this Court long ago noted, "An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Brown v. Thomson*, 462 U.S. at 842 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)). The plans introduced by members of the ALBC demonstrated that the number of county splits could be more than halved without running afoul of either one person, one vote or the Voting Rights Act. There is no need for a bright-line definition to show that Alabama's 2012 redistricting plans "unnecessarily" violate the one-person, one-vote rights of many county residents.

The refinement of appellants' suggested equal protection rule can and should await the next case with a different set of facts. This Court has upheld Wyoming's legislative decision to keep counties whole

even though it produced an average deviation of 16% and a maximum deviation of 89%. *Brown v. Thomson*, 462 U.S. at 839. *Mahan v. Howell* held that the statute redrawing the districts for the Virginia House of Delegates did not violate the Equal Protection Clause notwithstanding a maximum deviation of 16.4% among districts. 410 U.S. at 319. But it is an altogether different question to ask what maximum population deviations among state legislative districts are *required* to prevent diluting the votes of residents of political subdivisions whose local delegations exercise substantial control over local laws. The most that can be said now, as the dissent below observed, is that a state "cannot . . . fail to recognize at all its one-person, one-vote obligations to the voters residing in the Local Delegations across the state." J.S. App. 405.

II. There Is No Compelling Interest That Can Justify the State's Purposeful Preservation of Arbitrary Black Supermajorities.

1. It is unnecessary to scrutinize district shapes and census statistics to see that Alabama's 2012 House and Senate plans classify voters by race. There is direct evidence they do so. The redistricting committee chairs and their mapping consultant all openly admitted they tried to maintain the target percentages yielded by overlaying 2010 census data on the 2001 districts. The drafters repeatedly insisted their search for black precincts and/or census blocks to add to the uniformly underpopulated majority-black districts was the primary reason for the helter-skelter

fragmentation even of counties in the majority-white districts. These racial classifications of voters are subject to strict scrutiny. *Shaw v. Reno*.

2. The District Court majority erred when it held that Section 5 of the Voting Rights Act provided a narrowly tailored, compelling state interest for the State's attempt to maintain the size of every black majority. The Section 5 retrogression standard only prohibits diminishing the ability of protected minorities to elect candidates of their choice. It does not require maintaining particular black percentages regardless of whether they are necessary to construct ability-to-elect districts.

3. In any case, Section 5 is no longer binding on the State of Alabama. *Shelby County v. Holder*. The State offered no evidence to show that the sizes of its majority-black districts are needed to comply with Section 2 of the Voting Rights Act. The court below erred when it failed "to apply the law in effect at the time it renders its decision. . . ." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974), particularly where that failure causes a racial classification to "last longer than the [problem] it is designed to [address]." J.S. App. 269 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment of the District Court for the Middle District of Alabama.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-691 (Three-Judge Court)
ALABAMA DEMOCRATIC CONFERENCE, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-1081 (Three-Judge Court)

MEMORANDUM OPINION AND ORDER

(Filed Dec. 20, 2013)

Before PRYOR, Circuit Judge, WATKINS, Chief District Judge, and THOMPSON, District Judge.

PRYOR, Circuit Judge:

"There's no perfect reapportionment plan. A reapportionment plan depends on what the drafter wants to get, and he can draw them many, many, many

ways." Dr. Joe Reed, Chairman, Alabama Democratic Conference. (Trial Tr. vol. 2, 155, Aug. 9, 2013).

The Constitution of Alabama of 1901 requires the Alabama Legislature to redistrict itself following each decennial census of the United States, Ala. Const. Art. IX, §§ 199-200, but for a half century – from 1911 to 1961 – the Legislature failed to fulfill that duty. Then the Supreme Court of the United States ruled that this abdication could be tolerated no longer, and it affirmed the judgment of this Court that the Alabama Legislature had to be apportioned after each census based on the principle of one person, one vote. *Reynolds v. Sims,* 377 U.S. 533, 568, 586, 84 S. Ct. 1362, 1385, 1394 (1964). The Supreme Court explained, "[T]he basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Id.* at 567, 84 S. Ct. at 1384.

After the decision in *Reynolds v. Sims,* the Legislature struggled to redistrict itself and to satisfy the requirements of the federal Constitution. When the Alabama Legislature failed to perform its duty to redistrict itself after the 1970 Census, this Court adopted new district lines to protect the rights of the voters under the Fourteenth Amendment. *Sims v. Amos,* 336 F. Supp. 924 (M.D. Ala. 1972). In the 1980s, the Legislature successfully redistricted itself only after it twice failed to obtain administrative

preclearance of its first redistricting plans, under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and this Court then ordered Alabama to hold a special election using the new districts, *Burton v. Hobbie,* 561 F. Supp. 1029, 1035 (M.D. Ala. 1983). In the 1990s, the Legislature again failed to redistrict itself, and new districts were adopted instead by the Alabama judiciary. *See Brooks v. Hobbie,* 631 So. 2d 883, 884 (Ala. 1993).

After the 2000 and 2010 Censuses, the Legislature finally fulfilled its responsibility to redistrict itself without any federal or judicial interference. *See Montiel v. Davis,* 215 F. Supp. 2d 1279, 1281-82 (S.D. Ala. 2002). Both times, the Senate adopted a redistricting plan for itself, and the House adopted a plan for itself. Each chamber then, in turn, passed the plan adopted by the other chamber. And each time, the governor signed the redistricting acts, and the state attorney general then obtained administrative preclearance of the acts as required by the Voting Rights Act.

As the Legislature complied with *Reynolds v. Sims* and the Voting Rights Act, black voters enjoyed increasing success in electing their preferred candidates for the Alabama Legislature. In 1970, voters elected to the House of Representatives Fred Gray and Thomas Reed, the first two black legislators since Reconstruction. (Ex. SDX 448, 15). After the 1980 Census, voters elected 17 black candidates to the House and three black candidates to the Senate. *Id.* After the 1990 Census, voters elected 27 black

candidates to the House and 8 black candidates to the Senate. *Id.* After the 2000 Census, the Legislature adopted a redistricting plan that maintained 27 majority-black House districts and 8 majority-black Senate districts. Because most of the majority-black districts were substantially underpopulated, the Legislature redrew the districts by shifting more black voters into the majority-black districts to maintain the same relative percentages of black voters in those districts. (Ex. CE 30; Ex. CE 32; Ex. APX 4; Ex. CE 34).

Legislative redistricting regularly provokes partisan controversies. In the 1990s, Republicans filed lawsuits to challenge the districts adopted by the Alabama judiciary and favored by the Democrats, but those lawsuits failed. *Brooks,* 631 So. 2d 883; *Sinkfield v. Kelley,* 531 U.S. 28, 121 S. Ct. 446 (2000). After the 2000 Census, the Democrat-controlled Legislature adopted districts that favored its partisan interests. *Montiel,* 215 F. Supp. 2d at 1283. Republicans again challenged the districts in litigation, but their lawsuits failed. *See Gustafson v. Johns,* 434 F. Supp. 2d 1246, 1248-49 (S.D. Ala. 2006); *Montiel,* 215 F. Supp. 2d at 1281-82.

When Republicans challenged the district lines adopted after the 2000 Census, they targeted the systematic underpopulation of the majority-black districts, but State officials and Democratic leaders successfully defended the population deviations as "the product of the Democratic Legislators' partisan political objective to design Senate and House plans

that would preserve their respective Democratic majorities." *Montiel,* 215 F. Supp. 2d at 1283. State officials and Democratic leaders presented "abundant evidence . . . that black voters and Democratic voters in Alabama are highly correlated." *Id.* After the Republicans' complaint of racial gerrymandering failed, they filed another complaint that challenged the population deviations as an unlawful partisan gerrymander, but that complaint failed because it was barred by res judicata. *Gustafson,* 434 F. Supp. 2d at 1255-67. In a filing in the Supreme Court of the United States, the Democratic leadership of the Legislature openly touted the districts adopted in 2001 as a lawful partisan gerrymander that enabled black legislators to serve in positions of unprecedented leadership. (Ex. SDX 448.)

The partisan gerrymander that protected Democratic control of the Legislature collapsed in 2010 when Republicans gained supermajority control of both houses of the Legislature, which then adopted new redistricting acts based on the 2010 Census. 2010 Ala. Acts No. 602 (House plan); *id.* No. 603 (Senate plan). The Republican-controlled Legislature adopted district lines with smaller deviations in population equality, which upended the partisan gerrymander adopted by the Democrat-controlled Legislature after the 2000 Census. Not surprisingly, that result did not sit well with the Democratic leaders who filed these complaints. As a result, we must be careful not to take one side in a partisan battle masquerading as a legal controversy; our task

is to evaluate whether the new redistricting Acts violate the Constitution or federal law.

In these consolidated actions, Alabama has now come full circle. In the first civil action, several plaintiffs – the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner Jr., and Jiles Williams Jr. – complain that the purpose and effect of the new districts is to dilute and isolate the strength of black voters, in violation of section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. In the second civil action, several other plaintiffs – the Alabama Democratic Conference, Demetrius Newton, Framon Weaver Sr., Stacey Stallworth, Rosa Toussaint, and Lynn Pettway – complain that the purpose and effect of the new districts is to dilute the opportunities for minority voters to participate in the political process and that the new districts are products of racial gerrymandering. The plaintiffs in these actions, in contrast with the plaintiffs in *Reynolds*, complain that the Legislature redistricted itself based on too little deviation in population equality and paid too little attention to considerations of where voters live based on the jurisdictional lines of counties and other subdivisions. They also complain that the Legislature diluted the voting strength of black voters by moving them into underpopulated majority-black districts, even though the Democratic majority of the Legislature employed the same technique ten years

earlier to maintain the same relative percentages of black voters in those districts.

For the reasons explained in this memorandum opinion and order, we reject these complaints. We **DISMISS** the claims of racial gerrymandering filed by the Democratic Conference plaintiffs because they lack standing to maintain those claims; in the alternative, we **GRANT** judgment in favor of the State defendants on the claims of racial gerrymandering filed by the Democratic Conference plaintiffs. We **DISMISS** as not justiciable the claim of vote dilution based on the local House delegation in Jefferson County; in the alternative, we **GRANT** judgment in favor of the State defendants on the claim of vote dilution based on the local House delegation in Jefferson County. We **GRANT** judgment in favor of the State defendants on the remaining claims in both actions.

I. BACKGROUND

We divide our discussion of the background in two parts. First, we explain the procedural history of this matter. Second, we explain our findings of fact about the creation of the new districts for the Alabama Legislature based on the testimony and evidence introduced at a consolidated trial of these actions.

A. Procedural History

The Black Caucus plaintiffs filed a complaint against the State and Beth Chapman, in her official capacity as the Secretary of State of Alabama. The complaint asserted three counts: violation of the guarantee of one person, one vote under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 2; dilution and isolation of the strength of black votes in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Fourteenth Amendment, U.S. Const. Amend. XIV, and the Fifteenth Amendment, U.S. Const. Amend. XV; and partisan gerrymandering in violation of the First Amendment, U.S. Const. Amend. I. The Black Caucus plaintiffs moved for partial summary judgment and preliminary and permanent injunctive relief on count one of their complaint.

The State defendants filed a motion to dismiss or, in the alternative, to stay the action until the Attorney General of Alabama, Luther Strange, obtained either administrative or judicial preclearance of the new districts under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We granted the motion of the State defendants to stay the matter until either the Attorney General of the United States, Eric Holder, or the United States District Court for the District of Columbia decided whether to preclear the districts. After Attorney General Holder precleared the new districts, we lifted the stay of the action and denied the motion to dismiss filed by the State defendants. The State defendants then filed an answer to the

complaint and a motion for judgment on the pleadings with respect to all three counts.

After a hearing on the latter motions, the Democratic Conference plaintiffs filed a complaint against the State; Robert Bentley, in his official capacity as the Governor of Alabama; and Chapman, in her official capacity as the Secretary of State of Alabama. The Democratic Conference plaintiffs asserted three counts: violation of section 2 of the Voting Rights Act; racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments; and violations of constitutional and statutory rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After the Democratic Conference action was assigned to this three-judge court, we determined that both the Black Caucus action and the Democratic Conference action involve common questions of law and fact and consolidated them to avoid unnecessary repetition and confusion. *See* Fed. R. Civ. P. 42(a)(2).

On December 26, 2012, we denied the first motion for a partial summary judgment filed by the Black Caucus plaintiffs with respect to count one, granted the motion of the State defendants for a judgment on the pleadings as to count one, denied the motion of the State defendants for a judgment on the pleadings as to count two, and dismissed without prejudice count three of the complaint of the Black Caucus plaintiffs. We granted the Black Caucus plaintiffs leave to amend their complaint "to allege more facts and constitutional grounds to support [their] claim of political gerrymandering and to

identify a judicial standard by which we can adjudicate the claim."

On March 13, 2013, Senator Gerald Dial and Representative Jim McClendon filed an unopposed motion to intervene as defendants. Senator Dial and Representative McClendon are the Chairpersons of the Permanent Legislative Committee on Reapportionment of the State of Alabama. The Court granted the motion to intervene.

After the Black Caucus plaintiffs timely filed an amended complaint with a new count three entitled "Partisan Gerrymandering" and a second motion for a partial summary judgment on that claim, we again denied their motion. The Black Caucus plaintiffs responded to our denial of their motion with a motion to alter or amend our order. The Black Caucus plaintiffs argued that we failed to state a reason for our decision in contravention of Federal Rules of Civil Procedure 56(a) and 52(a)(2). Although we denied the motion, we *sua sponte* vacated our previous order, again denied the motion for a partial summary judgment, and substituted a new memorandum opinion and order. We explained that the claim of partisan gerrymandering filed by the Black Caucus plaintiffs failed to identify a judicial standard by which we could adjudicate the claim and that, under any standard of adjudication, the Black Caucus plaintiffs failed to explain how they are entitled to a judgment in their favor as a matter of law. We also explained that the Black Caucus plaintiffs failed to establish the absence of a genuine issue of material fact.

The State defendants then moved for a partial summary judgment on count three, and the Black Caucus plaintiffs filed a motion to reconsider our denial of their second motion for a partial summary judgment and a motion for a permanent injunction. At a hearing on the pending motions, the Black Caucus plaintiffs announced, for the first time, that count three encompassed two claims: an as-applied challenge for partisan gerrymandering in violation of the First Amendment and a facial challenge to the districts based on the Equal Protection Clause of the Fourteenth Amendment. We granted in part the motion for a partial summary judgment and entered judgment in favor of the State defendants on the claim of partisan gerrymandering and dismissed the claim under the Equal Protection Clause for lack of subject matter jurisdiction. We also explained, in the alternative, that the claim under the Equal Protection Clause failed on the merits. We denied the motion for reconsideration and denied as moot the motion for a preliminary injunction.

The State defendants filed motions for summary judgments against the remaining claims filed by the Black Caucus plaintiffs and the Democratic Conference plaintiffs, and we denied those motions. We concluded that the State defendants had failed to explain the absence of genuine issues of material fact or how they were entitled to a judgment as a matter of law.

On August 8, 9, 12, and 13, 2013, we conducted a consolidated bench trial at which the plaintiffs

presented arguments and evidence about two distinct kinds of claims. First, the plaintiffs argued that the State defendants had diluted the black vote in Alabama in violation of section 2 of the Voting Rights Act. (Trial Tr. vol. 1, 4, 6, Aug. 8, 2013). Second, the plaintiffs argued that the State defendants had engaged in intentional discrimination in violation of the Fourteenth and Fifteenth Amendments when they drew the new districts. (Trial Tr. vol. 1, 5, 6, Aug. 8, 2013). During the trial, we substituted Jim Bennett for Beth Chapman as a defendant, in Bennett's official capacity as the new Secretary of State of Alabama. Demetrius Newton died after the trial.

The State defendants responded that the redistricting plans violate neither section 2 of the Voting Rights Act nor the Constitution. They argued that the plaintiffs could not prove vote dilution because it is not possible to draw another compact, majority-black district, (Trial Tr. vol. 1, 11, Aug. 8, 2013), and that the Legislature acted with lawful motives, not with any unconstitutional racially discriminatory purpose, (Trial Tr. vol. 1, 14, Aug. 8, 2013). The State defendants argued that the Legislature adopted an overall deviation in population of 2 percent to comply with the requirement of one person, one vote, under the Equal Protection Clause of the Fourteenth Amendment. (Trial Tr. vol. 1, 12-13, Aug. 8, 2013). They also argued that the Legislature preserved the majority-black districts with roughly the same percentage of black voters to comply with the nonretrogression principle of section 5 of the Voting Rights Act so as to

obtain preclearance from the Attorney General of the United States.

Although the Black Caucus plaintiffs and the Democratic Conference plaintiffs both asserted claims under section 2, they framed their claims differently. The Black Caucus plaintiffs argued that the State defendants diluted black voting strength across the State by packing majority-black districts and ignoring traditional districting criteria, including the preservation of county lines. (Trial Tr. vol. 1, 4-6 Aug. 8, 2013). The Black Caucus plaintiffs also asserted claims of local vote dilution in Madison County based on the changes to Senate District 7 and in Jefferson County based on the changes to the balance of members of the local delegation. (Trial Tr. vol. 1, 5, Aug. 8, 2013). The Democratic Conference plaintiffs asserted claims of only local vote dilution. They argued that the plans failed to create a majority-black House district in Jefferson County and in Montgomery County and a minority opportunity Senate district in Madison County. (Trial Tr. vol. 1, 7-8, 11, Aug. 8, 2013).

The Black Caucus plaintiffs and Democratic Conference plaintiffs also made different arguments in support of their claims of intentional discrimination in violation of the Fourteenth and Fifteenth Amendments. The Black Caucus plaintiffs argued that the Legislature discriminated on the basis of race when it drew the districts to preserve the existing percentages of blacks in the majority-black districts and that this discrimination could not survive

strict scrutiny after the decision of the Supreme Court in *Shelby County, Alabama v. Holder*, ___ U.S. ___, 133 S. Ct. 2612 (2013). (Trial Tr. vol. 1, 4-5, Aug. 8, 2013). The Democratic Conference plaintiffs argued that the Legislature subordinated traditional redistricting criteria to racial criteria when it drew the majority-black districts; that the impact of the redistricting plans falls more heavily on minority voters; that the Republican-controlled Legislature had a desire to cement its supermajority status by inadequately representing minorities in the redistricting plans; and that the plans were drafted by a Republican consultant without input from black legislators, were not provided to the public until May, and were adopted in a special session of the Legislature. (Trial Tr. vol. 1, 8-9, Aug. 8, 2013).

B. Findings of Fact

We divide our findings of fact in five parts. In the first part, we describe the 2010 Census data and the information that it conveyed about the population of the State of Alabama. In the second part, we describe the 2001 districting plans and the effects of the population shifts on those plans. In the third part, we describe the redistricting process that followed the 2010 Census. In the fourth and fifth parts, we discuss the evidence presented at trial; we first consider the evidence presented by the plaintiffs and then consider the evidence presented by the State defendants.

1. The 2010 Census Data for the State of Alabama

Every ten years, the United States is required to make an "actual Enumeration" of its residents. *See* U.S. Const. Art. I, § 2, cl. 3. Based on the results of the census, each state must consider whether the methods it uses to elect its state officials comply with the requirement of one person, one vote under the Equal Protection Clause. *See Reynolds,* 377 U.S. at 568, 84 S. Ct. at 1385. This requirement applies to the election of officials in Congress, state legislatures, and local governments.

Between 2000 and 2010, the overall population of Alabama grew by 7.48 percent. Although the absolute number of the white non-Hispanic population increased, the percentage of the population composed of white non-Hispanic residents decreased by 3.3 percent. The absolute numbers of the black and Native American populations increased, but the percentages of the population composed of black residents and Native American residents remained relatively constant. Only the absolute number of the Hispanic population and the percentage of the population composed of Hispanic residents increased between 2000 and 2010. The 2010 Census reported that Alabama had 4,779,736 residents, including 3,204,402 white non-Hispanic persons (67 percent), 1,244,437 black persons (26 percent), 25,907 Native American persons (0.5 percent), and 185,602 Hispanic or Latino persons (3.9 percent). In 2000, Alabama had 4,447,100 residents, including 3,125,819 white non-Hispanic

persons (70.3 percent), 1,155,930 black persons (26 percent), 22,430 Native American persons (0.5 percent), and 75,830 Hispanic persons (1.7 percent). (Ex. NPX 325; Ex. NPX 326). The Court calculated the above percentages using the population statistics of the U.S. Census Bureau that the plaintiffs provided. When available, the Court elected to use the population data for each race that was identified as that racial group alone.

Alabama comprises 67 counties, and three of the most populous counties are Jefferson County, Madison County, and Montgomery County. According to the 2010 Census, Jefferson County had a total population of 658,466; a white population of 349,166; and a black population of 276,525. Between 2000 and 2010, the total population of Jefferson County decreased by 3,581; the white population decreased by 35,473; and the black population increased by 15,917. (Ex. NPX 328; Ex. NPX 329). In 2010, Madison County had a total population of 334,811; a white population of 228,280; and a black population of 80,376. Between 2000 and 2010, the total population of Madison County increased by 58,111; the white population increased by 28,879; and the black population increased by 17,351. (Ex. NPX 328; Ex. NPX 331). In 2010, Montgomery County had a total population of 229,363; a white population of 90,656; and a black population of 125,477. Between 2000 and 2010, the total population of Montgomery County increased by 5,853; the white population decreased by 18,524;

and the black population increased by 16,894. (Ex. NPX 328; Ex. NPX 330).

The legislative power of Alabama is vested in the Alabama Legislature, which consists of the Senate and the House of Representatives. Ala. Const. Art. IV, § 44. Members of the Legislature are elected on the first Tuesday after the first Monday in November, and they serve for terms of four years. *Id.* § 46. The next general election will take place on November 4, 2014. The Senate has 35 members elected by single-member voting districts. The House of Representatives has 105 members also elected by single-member voting districts. Based on the 2010 Census data, the ideal Senate district would have a total population of 136,564, and the ideal House district would have a total population of 45,521. (Ex. SDX 402; Ex. SDX 406).

2. The 2001 Districting Plans

In this subsection, we review two aspects of the 2001 districting plans that are relevant to this litigation. We explain that the districts established in 2001 were severely malapportioned in the light of the population data from the 2010 Census, and we describe the systematic underpopulation of the majority-black districts in the 2001 plans.

The new data from the 2010 Census revealed severe malapportionment of the House districts established in 2001 for use in the 2002 election. The population in 80 of the 105 districts for the Alabama

House of Representatives deviated from the ideal population by more than 5 percent. (Ex. NPX 332). Of those malapportioned districts, 22 deviated above or below the ideal population by more than 20 percent. (Ex. NPX 332). The most malapportioned district was District 41, a majority-white district in Shelby County, which was overpopulated by 60.76 percent. (Ex. NPX 332). Two other majority-white districts that included portions of Shelby County – Districts 43 and 50 – were overpopulated by 23.14 percent and 21.65 percent respectively. (Ex. NPX 332). District 50 also reached into St. Clair County. All three of these districts in Shelby and St. Clair Counties were in the Birmingham metropolitan area. Two majority-white districts in Baldwin County near Mobile – Districts 94 and 95 – were overpopulated by 31.29 percent and 35.41 percent respectively. And Districts 6 and 25, majority-white districts in Madison and Limestone Counties near Huntsville, were overpopulated by 26.70 percent and 42.68 percent respectively. (Ex. NPX 332).

The malapportionment was especially severe in the majority-black House districts that the Democrat-controlled Legislature had drawn as part of their successful partisan gerrymander in 2001. After the 2010 Census, all of the 27 majority-black districts in the House were underpopulated, and 25 were underpopulated by more than 5 percent, the maximum deviation used under the 2001 plans. (Ex. NPX 332). Nine of the majority-black districts were underpopulated by more than 20 percent. (Ex. NPX 332).

The new census data also revealed the malapportionment of the Senate districts. The population in 24 of the 35 districts for the Alabama Senate deviated from the ideal population by more than 5 percent. (Ex. NPX 340). Of those malapportioned districts, four of the districts deviated from the ideal population by more than 20 percent. (Ex. NPX 340). Like the House districts, the most malapportioned districts included portions of Shelby County, Limestone County, and Madison County. The most malapportioned district was District 2, a majority-white district in Limestone and Madison Counties, which was overpopulated by 31.12 percent. (Ex. NPX 340). Districts 14 and 15, majority-white districts that included portions of Shelby County, were overpopulated by 23.51 percent and 17.50 percent respectively. District 17, a majority-white district that included portions of St. Clair, Jefferson, and Blount Counties, was overpopulated by 15.09 percent.

As with the House districts, the malapportionment was especially severe in the majority-black Senate districts drawn by the Democrat-controlled Legislature as part of their successful partisan gerrymander in 2001. All of the eight majority-black districts were underpopulated. (Ex. NPX 340). Seven of the eight majority-black districts were underpopulated by more than 10 percent, and two of those districts were underpopulated by more than 20 percent. (Ex. NPX 340). Many of these malapportioned districts were located within the "Black Belt," a south-central region of the State named for its black

soil. A large black population resides there because of a history of agriculture and slavery.

The underpopulation of the majority-black House and Senate districts reflected the systematic underpopulation of those districts in previous rounds of redistricting over the last twenty years. In the 1993 Reed-Buskey plans, which Democratic legislators proposed and a state court approved, 25 of the 27 majority-black districts in the House of Representatives were underpopulated, and 19 of those 25 were underpopulated by more than 4 percent. (Ex. SDX 417). All eight of the majority-black districts for the Senate were underpopulated, and six of them were underpopulated by more than 4 percent. (Ex. SDX 414). In the 2001 plans, adopted by the then-Democratic Legislature, 22 of the 27 majority-black House districts were underpopulated, and 10 of those districts were underpopulated by greater than 4 percent. (Ex. SDX 411). Six of the eight majority-black Senate districts were underpopulated, and four of those districts were underpopulated by greater than 4 percent. (Ex. SDX 407).

In 2001, the Democrat-controlled Legislature repopulated the majority-black districts by shifting thousands of black people into those districts to maintain the same relative percentages of the black population in those districts. The following table illustrates how the Legislature repopulated the majority-black House districts by adding thousands of black people to 26 of those districts.

House District	2001 Plan	Total Black Pop. (%)	1993 Plan Using 2000 Census Data	Black Total Pop. (%)	1993 Plan Using 1990 Data	Total Black Pop. (%)
19	28,011	66.039	25,869	78.565	25,118	66.27
32	24,975	59.598	22,704	63.490	24,626	63.93
52	27,716	65.848	25,799	73.870	24,825	67.72
53	26,247	64.445	21,312	65.298	24,136	66.01
54	25,563	63.276	20,153	63.061	23,567	63.95
55	27,344	67.772	27,217	76.270	22,534	61.57
56	26,546	62.665	23,896	70.268	23,326	63.52
57	25,373	62.967	28,593	82.615	23,453	63.90
58	25,937	63.518	24,284	74,163	22,969	62.75
59	25,449	63.241	20,459	66.255	23,367	63.86
60	26,693	64.348	23,455	74.876	24,380	66.22
67	25,663	63.447	23,358	71.032	23,247	63.50
68	25,227	62.211	23,051	62.938	23,774	63.58
69	26,417	65.308	25,198	64.855	23,149	63.29
70	26,587	62.827	23,375	75.603	24,460	64.60
71	25,872	64.191	24,041	67.736	24,390	66.16
72	25,561	60.748	24,825	64.652	24,436	65.36
76	30,117	73.309	29,655	76.527	24,427	66.69
77	28,546	69.677	23,986	74.802	26,704	71.93
78	29,390	72.697	23,911	68.874	26,468	72.37
82	27,605	62.663	30,493	78.826	30,503	79.73
83	24,651	61.214	26,144	60.782	25,957	64.52
84	21,696	52.360	16,235	39.353	13,832	37.81
85	19,964	47.863	16,934	53.312	18,696	51.13
97	27,667	64.738	24,414	67.243	23,878	65.22
98	27,393	64.448	22,935	69.401	24,062	65.72
99	27,674	65.250	25,950	74.916	24,033	65.09
103	26,570	63.049	25,832	75.299	24,003	65.58

(Ex. CE 30; Ex. CE 32; CE 31).

In total, the Democrat-controlled Legislature moved 62,376 black people into the majority-black House districts to maintain the same relative percentages of black population in those districts. In 2001, 62,376 black people constituted 5.4 percent of the total black population in Alabama.

The following table illustrates that the Legislature repopulated the majority-black Senate districts by adding thousands of black people to all but one of those districts.

Senate District	2001 Plan	Total Black Pop. (%)	1993 Plan Using 2000 Data	Total Black Pop. (%)	1993 Plan Using 1990 Data	Total Black Pop. (%)
18	82,769	66.865	67,264	67.588	72,528	65.89
19	80,662	66.227	79,706	76.452	69,313	63.00
20	80,075	65.697	68,198	71.829	70,716	64.28
23	75,380	62.305	71,607	66.081	70,170	63.46
24	75,520	62.409	72,245	68.964	73,286	65.36
26	92,486	71.507	77,552	73.485	77,599	70.34
28	71,653	56.458	72,872	59.269	70,292	61.09
33	79,492	62.451	73,299	70.483	71,973	65.34

(Ex. APX 4; Ex. CE 34; Ex. SDX 415).

In total, the Democrat-controlled Legislature moved 55,294 black people into the majority-black Senate districts to maintain the same relative percentages of black population in those districts. In 2001, 55,294 black people constituted 4.8 percent of the total black population in Alabama.

The Democratic leaders of the previous Legislature were never shy about their partisan strategy in redistricting. After the adoption of the 2001 districts, the Democratic leaders filed, as amici curiae, a brief in the Supreme Court of the United States that described the districts as an example of a successful partisan gerrymander. *See* Brief for Leadership of the Alabama Senate and House of Representatives: Lowell Barron, et al. as Amici Curiae Supporting Appellees, *Vieth v. Jubelirer,* 541 U.S. 267, 124 S. Ct. 1769 (2004) (No. 02-1580) (Ex. SDX 448). The brief explained that, during the redistricting process after the 2000 Census, "the Democratic leadership pursued a biracial strategy aimed at safeguarding its governing majorities in both houses of the Legislature." *Id.* The brief bragged that the partisan strategy succeeded: "The 2002 general election returned Democratic candidates to 71% of the Senate seats and 60% of the House seats, with 52% of the statewide vote supporting Democrats in Senate races and 51% supporting Democrats in House races." *Id.* But this partisan gerrymander, during a period of realignment when Republicans won presidential and other statewide elections with increasing frequency, rested on a shaky foundation that collapsed in 2010 when

Republicans won supermajorities in both houses of the Legislature.

3. The Redistricting Process After the 2010 Census

After the 2010 Census, the Alabama Legislature began the process of redistricting itself. We describe that process from its inception to the adoption of the final plans by the Legislature. In so doing, we describe the work of the permanent legislative committee on reapportionment, the guidelines adopted by the committee, and the consultant hired by the committee to draw the new district lines.

a. The Permanent Legislative Committee on Reapportionment

The Alabama Code provides for a Permanent Legislative Committee on Reapportionment to address the problems of malapportionment that may arise after each new census. *See* Ala. Code §§ 29-2-50, -51. When the Legislature is not actively involved with the reapportionment process, the Committee comprises six members, three from each house of the Legislature. *Id.* § 29-2-51(b). During the reapportionment process, Alabama law requires that the Committee expand to 22 members. *Id.* § 29-2-51(c). Those 22 members must include "[o]ne member of the House of Representatives from each congressional district, four members of the House of Representatives at-large . . . appointed by the Speaker of the House and

one member of the Senate from each congressional district, four members of the Senate at-large . . . appointed by the Lieutenant Governor." *Id.* The current members of the Committee include Senator Trip Pittman (R), Senator Jimmy Holley (R), Senator Gerald Dial (R), Senator Clay Scofield (R), Senator William L. Holtzclaw (R), Senator Cam Ward (R), Senator Linda Coleman (D), Senator Gerald Allen (R), Senator Vivian Davis Figure (D), Senator Arthur Orr (R), Senator Bryan Taylor (R), Representative George Bandy (D), Representative Randy Davis (R), Representative Steve Clouse (R), Representative Barbara Boyd (D), Representative Craig Ford (D), Representative Lynn Greer (R), Representative Jim McClendon (R), Representative Ralph Howard (D), Representative Jamie Ison (R), Representative Mike Hill (R), and Representative Micky Hammon (R). (Joint Stip. 2-3). Senator Dial and Representative McClendon co-chair the Committee. (Joint Stip. 3). All of the Republicans on the Committee are white. (Joint Stip. 2-3). Representative Ford is the only white Democrat on the Committee; all of the other Democrats on the Committee are black. (Joint Stip. 2-3).

The Committee is primarily charged with the creation of each new reapportionment plan for the State. *See* Ala. Code § 29-2-50(2). The Committee is required to "make a continuous study of the reapportionment problems in Alabama"; "make reports of its investigations, findings[,] and recommendations to the Legislature at any time, during any regular or special session of the Legislature, as it may deem

necessary"; and "engage in such activities as it deems necessary for the preparation and formulation of a reapportionment plan" for the Alabama Legislature and the congressional districts of the State. *Id.* § 29-2-52(a), (b), (c). The Committee has the authority "to employ consultants, technicians, attorneys[,] and any other experts needed to prepare maps and make professional appearances to support any plan of reapportionment adopted by the Legislature" and to "meet within and without the state, hold public hearings[,] and otherwise have all of the powers of a legislative committee." *Id.* § 29-2-52(d), (g).

b. Guidelines Adopted by the Committee

To guide its work, the current Committee established written guidelines for drawing the new district lines for members of Congress, the State Board of Education, and the Legislature. (Joint Stip. 3). In these guidelines, the Committee changed the allowable overall deviation in population for the State Board of Education and the Legislature from 10 percent, which had been used in the 1993 and 2001 plans, to 2 percent. (Joint Stip. 3; Doc. 30-4, 2). The guidelines also provided that the districts be drawn in accordance with the Voting Rights Act, be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest. (Ex. SDX 420). The guidelines acknowledged that not all of the redistricting goals could be accomplished and provided that, in

cases of conflict, priority would be given to the requirement of one person, one vote and to the requirements of the Voting Rights Act. (Ex. CE 1). Senator Dial and Representative McClendon believed that the Legislature was obligated, under the Voting Rights Act, to preserve the existing number of majority-black districts. (Joint Stip. 5). And Senator Dial personally promised the other members of the Senate that he would try to make sure that none of the incumbents would have to run against each other in the new plan. (Joint Stip. 4).

The Committee adopted the guideline of an overall deviation in population of 2 percent to comply with the requirement of one person, one vote under the Fourteenth Amendment after a recent decision of another district court sitting in the Eleventh Circuit that cast doubt on the presumptive constitutionality of a deviation of 10 percent. In *Larios v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd,* 542 U.S. 947, 124 S. Ct. 2806 (2004), the district court concluded that a redistricting plan in Georgia, which had used an overall deviation in population of 10 percent, violated the Equal Protection Clause because the "population deviations in the Georgia House and Senate were not driven by any traditional redistricting criteria such as compactness, contiguity, and preserving county lines," but were the result of a "concerted effort to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence (at the expense of suburban Atlanta), even as the rate of population growth in those areas was substantially lower." *Id.* at

1341-42. The district court also cast doubt on the notion that an overall deviation of 10 percent could always serve as a "safe harbor" for a state, especially in the light of developing technology that made it possible to achieve substantially greater population equality. *Id.* at 1341 ("It is [] apparent that any efforts to minimize population deviations ceased once the ± 5% level was reached, even though perfect equality was certainly attainable given current technology. Such use of a 10% population window as a safe harbor may well violate the fundamental one person, one vote command of *Reynolds,* requiring that states 'make an honest and good faith effort to construct districts . . . as nearly of equal population as practicable' and deviate from this principle only where 'divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy.'" (quoting *Reynolds v. Sims,* 377 U.S. 533, 577, 579, 84 S. Ct. 1362, 1390, 1391 (1964))). The Supreme Court affirmed that decision. *Larios,* 542 U.S. at 947, 124 S. Ct. at 2806.

Many states across the country adopted an overall deviation in population of 2 percent or less for the redistricting of their state legislatures after the 2010 Census. Florida used an overall deviation of 2 percent in its State Senate districts and an overall deviation of 4 percent in its State House districts. (Ex. APX 76). Georgia used an overall deviation of 2 percent in both houses of its legislature. (Ex. APX 76). California, Illinois, Iowa, Minnesota, Nevada, Utah, Washington, and Wisconsin used an overall deviation of 2 percent

or less for both houses of their legislatures. (Ex. APX 76). And Indiana, Oklahoma, and Virginia used an overall deviation of 2 percent or less for at least one house of their legislatures. (Ex. APX 76).

c. Public Hearings

At the beginning of the reapportionment process, the Committee conducted public hearings at 21 locations throughout Alabama. (Joint Stip. 4). The hearings occurred during October 2011 in DeKalb County, Marshall County, Madison County, Lauderdale County, Fayette County, Morgan County, Chilton County, Shelby County, Jefferson County, Houston County, Pike County, Butler County, Escambia County, Mobile County, Clarke County, Marengo County, Tuscaloosa County, Calhoun County, Lee County, Dallas County, and Montgomery County. (Ex. NPX 350). The Committee used the schedule of public hearings that had taken place during the last round of reapportionment in 2001 as the template for its schedule of public hearings and made changes to the locations based only on specific requests from members of the Committee. (Ex. NPX 350). Senator Dial and Representative McClendon attended all of the hearings. (Joint Stip. 4). The other members of the Committee attended some of the hearings, and other members of the Legislature occasionally spoke at the hearings. (Joint Stip. 4). The first 21 meetings were held before the Committee had completed any draft plans. Members of the public who attended these hearings asked the Legislators to keep counties whole to the extent

possible, preserve communities of interest, and allow voters to keep the representatives and senators with whom they were already familiar. At the public hearing in Dallas County, Senator Hank Sanders (D), a black senator who represents a majority-black district, asked Senator Dial to use 62 percent as a minimum for the majority-black districts because often the population statistics for a district do not reflect the actual voters in that district. (Ex. CE 21, 6). At the public hearing in Clarke County, Representative Thomas Jackson (D), a black representative of a majority-black district, asked that his district be 62 to 65 percent black. (Ex. CE 16, 8).

d. Randy Hinaman Hired as Consultant To Draw the Redistricting Plans

Senator Dial and Representative McClendon worked with Randy Hinaman to draw the new districts for the Legislature. (Ex. APX 68). Hinaman is a political consultant with experience working in Alabama. (Ex. NPX 352). He drew the congressional districts in Alabama after the 2010 Census, (Ex. NPX 352); worked with Democratic leaders after the 2000 Census to draw the congressional districts adopted by the Legislature and precleared by the Department of Justice, (Trial Tr. vol. 3, 115-16, Aug. 12, 2013); and drew congressional districts that were adopted by another three-judge district court in 1992 and affirmed by the Supreme Court, *see Wesch v. Hunt,* 785 F. Supp. 1491, 1500 (S.D. Ala.), *aff'd sub nom. Camp v. Wesch,* 504 U.S. 902, 112 S. Ct. 1926 (1992). (Trial

Tr. vol. 3, 114-15, Aug. 12, 2013). He also served as the campaign manager and then as chief of staff for Alabama Congressman Sonny Callahan during the 1980s. (Ex. NPX 352). In 2011, Hinaman contracted with Citizens for Fair Representation, a nonprofit organization, to coordinate with the Republican leadership of the Legislature to redraw the district lines for the Legislature after the 2010 Census. (Ex. NPX 352).

Hinaman used a computer program known as Maptitude to draw the plans. Maptitude allows the user to draw districts based on the data from the census. (Hinaman Depo. 15:16-18, June 25, 2013). The program also allows the user to load additional data into the program to assist with the drawing of the districts. (Hinaman Depo. 15:16-23, June 25, 2013). Hinaman collected political data from the Republican National Committee for every election in Alabama between 2002 and 2010 and imported that data into Maptitude. (Hinaman Depo. 15:3-13, June 25, 2013). Hinaman also collected and imported information about the residences of incumbents from the Reapportionment Office. (Hinaman Depo. 36-38, June 25, 2013).

On September 22, 2011, Hinaman met with Speaker of the House Mike Hubbard, President Pro Tempore Del Marsh, Senator Dial, Representative McClendon, attorney Dorman Walker, and staff to agree upon goals and establish a timeline for the drawing of the new districts. (Hinaman Depo. 23, 156, June 25, 2013). The participants understood that, under the Voting Rights Act, the new districts

could not reduce the total number of majority-black districts for each house and that the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census. (Hinaman Depo. 24, June 25, 2013). Hinaman suggested that he should begin with the majority-black districts when he drew the map, and all of the participants agreed. (Hinaman Depo. 24, June 25, 2013). The legislators also asked Hinaman to avoid the placement of two incumbent members of the Legislature in a single new district. (Hinaman Depo. 26, June 25, 2013). And the participants agreed that Hinaman should try to maintain the characteristics of the preexisting districts to the extent possible. (Hinaman Depo. 26-27, June 25, 2013).

Senator Dial, Representative McClendon, and Hinaman understood "retrogression" under section 5 of the Voting Rights Act to mean the reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as compared to the 2001 districts with the 2010 data. (Trial Tr. vol. 3, 221, Aug. 8, 2013). Section 5 requires that a covered jurisdiction obtain preclearance of a new voting "standard, practice, or procedure" by either the Attorney General of the United States or the United States District Court for the District of Columbia to ensure that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. "Whether a voting

procedure change should be precleared depends on whether the change would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Georgia v. Ashcroft,* 539 U.S. 461, 466, 123 S. Ct. 2498, 2504 (2003). When the Attorney General evaluates whether a new redistricting plan has a "retrogressive" effect, the Attorney General compares the old districts in the light of updated census data with the new plans. *See* Dep't of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act,* 76 Fed. Reg. 7471-01 (Feb. 9, 2011).

Hinaman worked alone on the new districts during the fall of 2011. He began with the majority-black districts. (Hinaman Depo. 38, June 25, 2013). Although during this phase Hinaman did not personally speak with the black members of the Legislature who represented those districts, he incorporated proposals that he received from Senator Dial and Representative McClendon after they met with the representatives from those districts. (Hinaman Depo. 39, June 25, 2013). After he drafted the majority-black districts, Hinaman started in the southern corners of the State and worked toward the center of the map. (Hinaman Depo. 38-39, June 25, 2013). He provided an initial plan to Senator Dial and Representative McClendon around February 2012.

During the spring of 2012 while the Legislature was in regular session, Hinaman continued to work on the district plans and incorporate feedback from the legislators. Hinaman traveled to Alabama to meet

in person with many of the Republican legislators. (Trial Tr. vol. 3, 119-20, Aug. 12, 2013). Although he did not meet with Democratic legislators, he incorporated suggestions that Senator Dial and Representative McClendon received from Democratic legislators. (Trial Tr. vol. 3, 120, Aug. 12, 2013). Senator Dial gave Hinaman proposed maps for the three majority-black Senate districts in Jefferson County that Senator Rodger Smitherman (D), a black legislator from Jefferson County, had provided him. (Hinaman Depo. 43, June 25, 2013). Senator Dial instructed Hinaman to incorporate those maps into the Senate plan to the extent possible because they represented the wishes of the three senators from those districts. (Hinaman Depo. 43, June 25, 2013). Hinaman drew the majority-black districts in Jefferson County to be substantially the same as the maps provided to him by Senator Dial. (Hinaman Depo. 43, June 25, 2013). Representative McClendon gave Hinaman proposed maps for the drawing of Montgomery County that McClendon had been given by Representative Thad McClammy (D), a black legislator from that county. (Hinaman Depo. 45, June 25, 2013). Notably, the McClammy map proposed the move of House District 73 from Montgomery County. It was a consensus map among the black Democratic representatives of Montgomery County. House District 73 is represented by Joe Hubbard, a white freshman Democrat. (Trial Tr. vol. 2, 25, Aug. 9, 2013). Representative McClendon told Hinaman to adopt as many of Representative McClammy's ideas as possible, and Hinaman followed

that instruction. (Hinaman Depo. 45-46, June 25, 2013).

Senator Dial and Representative McClendon unveiled the plans to the Committee on May 9, 2012. The plan for the House of Representatives increased the total number of majority-black districts from 27 to 28 based on total population figures. The new majority-black district was District 85, which had previously been a plurality-black district. District 85 is located in southeast Alabama in Henry and Houston Counties. (Ex. SDX 404; Ex. CE 41). Because of the severe malapportionment of most of the majority-black districts, the new plans had to incorporate significant changes to those districts.

e. The Six Districts Challenged by Plaintiffs

Primarily at issue in this matter are six decisions made by Hinaman, in consultation with members of the Legislature. In the map for the House of Representatives, Hinaman moved one majority-white district, House District 73, out of Montgomery County, and moved one majority-black district, House District 53, out of Jefferson County. In the map for the Senate, Hinaman reworked the boundaries of Senate Districts 7, 11, 22, and 26.

i. House District 73

Hinaman moved House District 73, a majority-white House district, from Montgomery County to

Shelby and Bibb Counties to avoid retrogression of the majority-black House districts in Montgomery County. The 2001 plan divided Montgomery County into six House districts – Districts 73, 74, 75, 76, 77, and 78 – three of which were majority-white and three of which were majority-black. (Ex. SDX 406). The new plan divided Montgomery County into seven House districts – Districts 69, 74, 75, 76, 77, 78, and 90 – four of which are majority-black districts, and three of which are majority-white districts. (Ex. APX 15). Although House District 73 was a majority-white district under the 2001 plan, its black population had grown since 2000, and Hinaman was able to use that population to repopulate the majority-black districts in Montgomery County without retrogression. (Ex. APX 15; Ex. APX 16). Hinaman placed the new District 73 in Shelby County, one of the fastest growing areas of the State. (Ex. APX 15). Although Hinaman had begun working on this idea in early 2012, he refined the concept after he received a map from Representative McClammy that also used the former District 73 to repopulate the majority-black districts. (Hinaman Depo. 134, June 25, 2013).

ii. House District 53

Hinaman also moved House District 53, a majority-black district, from Jefferson County to the Huntsville area in Madison County because of the substantial underpopulation of the majority-black districts in Jefferson County. (Ex. APX 15). Under the 2001 plan, Jefferson County had nine majority-black House

districts and nine majority-white House districts. (Hinaman Depo. 60-61, June 25, 2013). Although the black population in Jefferson County increased between 2000 and 2010, that change was not reflected in the majority-black districts in the County. Instead, all of the majority-black districts in Jefferson County were significantly underpopulated. Because of that underpopulation, Hinaman could not comply with the guideline for population deviation adopted by the Committee and maintain nine majority-black House districts within Jefferson County without significantly reducing the percentage of black voters in each district. (Hinaman Depo. 60-61, June 25, 2013). To preserve the total number of majority-black districts and avoid a problem of retrogression under section 5 of the Voting Rights Act, Hinaman moved District 53 to Madison County and used the population that had previously been located within District 53 to repopulate the other majority-black districts in Jefferson County. (Hinaman Depo. 60-61, June 25, 2013). Under the new plan, the same number of House districts include a portion of Jefferson County, but ten of those districts are majority-white and eight of those districts are majority-black. (Hinaman Depo. 62-63, June 25, 2013). Although the racial balance of the districts has changed, the partisan balance of incumbents has not: nine of the House districts have Republican incumbents as residents, and nine of the House districts have Democratic incumbents as residents. But the majority-white district with a Democratic incumbent might elect a Republican, which would likely shift the partisan balance to 10

Republicans and 8 Democrats. Jefferson County is 53.62 percent white and 42.47 percent black. (Ex. APX 19; Ex. NPX 328).

iii. Senate District 7

Hinaman reduced the population of Senate District 7 to accommodate the overpopulation of it and its neighboring districts. District 7, a majority-white district in Madison County with a substantial minority population, was overpopulated by 9.04 percent. (Ex. SDX 402; Ex. CE 29). To the west, District 7 shared a border with District 2, which was overpopulated by 31.12 percent. (Ex. SDX 402; Ex. CE 29). To the south, District 7 shared a border with Districts 3 and 9, which were overpopulated by 10.69 percent and 5.85 percent respectively. (Ex. SDX 402; Ex. CE 29). To the east, District 7 shared a border with District 8, which was overpopulated by 4.07 percent. (Ex. SDX 402; Ex. CE 29). To the north, District 7 shared a border with Tennessee. (Ex. SDX 402; Ex. CE 29). Under the new map, Hinaman took some residents of Limestone and Madison Counties from District 2 and moved them into District 1. (Ex. APX 17). Hinaman removed a total of 10,994 people from District 7, and 10,151 of those people were black. He moved most of that population into Senate District 1, which was represented by Senator Tammy Irons (D).

iv. Senate District 11

Hinaman significantly altered the shape of Senate District 11, a majority-white district formerly located in Calhoun, Talladega, Coosa, and Elmore Counties, because of changes to nearby districts. Hinaman testified that the changes made to District 11 were the result of "a combination of how the rest of those districts were moved around." (Trial Tr. vol. 3, 125, 171, Aug. 12, 2013). Under the 2001 plan, Senate District 30 was a bizarre district drawn in the shape of an Elmo projector, with Butler, Crenshaw, and Pike Counties forming a sturdy base for the district, and a portion of Lowndes County forming a thin neck to its head in Autauga County. (Ex. APX 37). Under the new plan, District 30 is a more compact district that includes all of Autauga and Coosa Counties and portions of Chilton and Elmore Counties. (Ex. APX 17). Because District 30 now encompasses all of Coosa County, the district shares a border with the new District 11, which includes portions of St. Clair, Shelby, and Talladega Counties. (Hinaman Depo. 127, June 25, 2013). The former District 11 was 62.59 percent white and 33.95 percent black. (Ex. NPX 340). The new District 11 is 81.66 percent white and 14.96 percent black. (Ex. APX 6). The incumbent senator from District 11, Jerry Fielding, switched from the Democratic Party to the Republican Party after the Legislature approved the new districts.

v. Senate District 22

Although Senate District 22 in southwest Alabama was not malapportioned in 2010, Hinaman redrew its borders to accommodate shifts in population from neighboring districts that were significantly malapportioned. In 2010, three of the Senate districts in Mobile County – Districts 33, 34, and 35 – were underpopulated by a total of 15,656 people. (Ex. SDX 402). Senate District 32, which was located in Baldwin County on the eastern shore of Mobile Bay, was overpopulated by 19,055. (Ex. SDX 402). Baldwin County is bordered on the east by Florida, the south by the Gulf of Mexico, and the west by Mobile Bay and Mobile County. Mobile County is bordered on the west by Mississippi, the south by the Gulf of Mexico, and the east by Mobile Bay and Baldwin County. Senate District 22, which included portions of Washington, Clarke, Choctaw, Escambia, Monroe, and Conecuh Counties, bordered District 34 on the north, and extended down into a strip of land in Mobile and Baldwin Counties between Districts 33 and 34 on the west and District 32 on the east. (Ex. APX 48). Senate Districts 23 and 24 bordered Senate District 22 on the north and both were majority-black districts with significant underpopulation. (Ex. APX 48). Hinaman considered moving District 35 across Mobile Bay to gain some of the overpopulation from Baldwin County, but Senator Trip Pittman (R) of District 32 objected to that proposal. (Hinaman Depo. 108-09, June 25, 2013). Hinaman decided instead to repopulate District 35 by taking population from District 34;

to transfer population from a portion of District 22 in Mobile County to District 34; to move northern portions of District 32 in Baldwin County into District 22; and to repopulate Districts 23 and 24 with some of the portions of District 22. (Ex. APX 49). As a result, District 22 crossed into all of the same counties as in the 2001 plan, but the District included smaller portions of Mobile, Choctaw, and Washington Counties. (Ex. APX 49). The new map divided the MOWA Band of Choctaw Indians, a small Native American tribe not recognized by the federal government, between District 22 and District 34. (Ex. APX 49).

vi. Senate District 26

Hinaman substantially decreased the land size of Senate District 26, a majority-black district in Montgomery County. (Trial Tr. vol. 2, 123, Aug. 9, 2013). Under the 2001 plan, Senate District 26 included the majority of Montgomery County, following the county lines. (Trial Tr. vol. 3, 122, Aug. 12, 2013). In 2010, the total population of District 26 was underpopulated by 11.64 percent and was 22.03 percent white and 72.75 percent black. (Ex. NPX 340; Ex. APX 7). To comply with the guideline of an overall deviation in population of 2 percent, Hinaman moved some of the densely populated precincts in the City of Montgomery into Senate District 26. (Trial Tr. vol. 3, 129, Aug. 12, 2013). Under the 2001 plan, Senate District 25 was located primarily in Elmore County to the northeast of Senate District 26. (Ex. SDX 477). To

maintain contiguous districts and as a result of moving other districts, Hinaman created a land bridge through Montgomery County to connect District 25 with Crenshaw County to the south. (Trial Tr. vol. 3, 127-29, Aug. 12, 2013). This land bridge removed a large geographic portion of District 26, although it did not significantly reduce the population of the district. (Trial Tr. vol. 3, 128-29, Aug. 12, 2013). Under Act 603, the new redistricting plan for the Senate, Senate District 26 maintains much of its former shape by following the county lines at the northern borders. (Ex. SDX 476). The district remains underpopulated by .08 percent and the percentage of the population that is black has increased slightly, from 72.75 percent to 75.22 percent. (Ex. APX 7).

f. Adoption of the Plans by the Committee

The Committee adopted these plans on May 9, 2012, as working drafts, and then officially adopted the plans on May 17, 2012. (Ex. CE 24; Ex. CE 25). In both meetings, Senator Dial and Representative McClendon explained the plans, and the Committee discussed them. The Committee adopted the McClendon House plan as a working draft by a recorded vote of 16 yeas and 3 nays and the Dial Senate plan by a voice vote. (Ex. CE 24). The Committee officially adopted the plans one week later by the same votes. (Ex. CE 25).

The Committee conducted a twenty-second public hearing in Montgomery approximately an hour and a half after it adopted the plans. (Ex. CE 23). At that hearing, several legislators objected to particular splits of counties and to the decision to split Lauderdale and Colbert Counties into two different Senate districts because those counties form a community of interest known as the "Shoals." (Ex. CE 23). Under the 2001 plan, all of Lauderdale County and most of Colbert County had been located within District 1. Under the new plan, part of Lauderdale County and all of Colbert County are now located in District 6, and District 1 now includes portions of Lauderdale, Limestone, and Madison Counties. Representative Merika Coleman (D) from Jefferson County objected to what she viewed as the "packing and stacking" of the black vote. (Ex. CE 23). Representative Joe Hubbard (D) objected to the districts for Montgomery County, which he viewed as disrespectful of communities of interests, and to the decision to move his district, District 73, to Shelby County. (Ex. CE 23). Two local officials from Clay County objected to its division into two districts because the 2001 plan had included the county in a single House district. (Ex. CE 23). And voters from several counties raised objections to the lack of sufficient advance notice for the hearing and to the splitting of certain counties.

In the final week before the passage of Act 602 and Act 603, Hinaman met with legislators at a computer in the Reapportionment Office to make final adjustments to the maps. (Hinaman Depo. 41-42, June

25, 2013). Hinaman met with several Democratic members of the Legislature during this process. (Hinaman Depo. 41-42, June 25, 2013). Representative McClendon and Hinaman were able to accommodate some of the representatives, including Barry Mask (R) and Greg Wren (R), who had some issues that affected Montgomery; Oliver Robinson (D), Mary Moore (D), and Patricia Todd (D), who wanted to swap precincts in the Birmingham area; Greg Burdine (D), Marcel Black (D), and Johnny Mack Morrow (D), who had requests for their shared borders in northwest Alabama; Jeremy Oden (R), Ed Henry (R), Wes Long (R), and Kerry Rich (R), who also had problems with their shared border in northeast Alabama; and two representatives who had initially been drawn outside of their districts. (Ex. APX 64-5, 5-6). But Representative McClendon and Hinaman were not able to accommodate requests from Representative Merika Coleman and Representative Juandalynn Givan, two members from the Birmingham area, who wanted to move 3,700 people from one district to another because that change would have violated the guideline of an overall deviation of 2 percent. (Ex. APX 64-5, 5-6). Senator Dial tried to accommodate a request from Senator Tammy Irons (D) to move her law office into her district, but he was unable to offer an amendment on the Senate floor because another senator, Mark Keahey (D), called for a third reading of the bill at length and the rules of the Legislature require an immediate vote on a bill after it has been read three times. (Ex. APX 64-4, 5).

Throughout the process, Senator Dial and Representative McClendon had to balance the requirements of the committee guidelines against the preferences of incumbents. And the new districts needed to be passed by the Legislature. (Trial Tr. vol. 1, 42, Aug. 8, 2013). Senator Dial adjusted the Senate plan repeatedly to satisfy legislators so that the bill could be passed. But many legislators, both Republican and Democrat, were dissatisfied with the plans. (Trial Tr. vol. 3, 42, Aug. 8, 2013).

g. The Final Redistricting Plans: Act 602 and Act 603

The final versions of the House and Senate bills preserved the majority-black districts with roughly the same percentages of black population as in the 1993 and 2001 plans. (Ex. APX 6; Ex. APX 7). The statistics are consistent with the agreement between Hinaman, the Republican leadership, and the co-chairs of the Committee to preserve the majority-black districts without retrogression. As the following table illustrates, Act 602 increased slightly the percentage of the black population in 14 of the original 27 majority-black House districts, decreased slightly the percentage of the black population in the other 13 majority-black House districts, and created one new majority-black House district in total population.

House District Number	Act 2012-602 Total Black Pop. (%)	Overpop. (+) or Underpop. (-) of 2001 District Using 2010 Census Data (%)	2001 House Total Black Pop. (%)	1993 House Total Black Pop. (%)
19	61.5	-6.90	66.039	66.27
32	60.3	-14.76	59.598	63.93
52	60.1	-5.19	65.848	67.72
53	56.2	-22.28	64.445	66.01
54	56.9	-23.32	63.276	63.95
55	73.6	-21.86	67.772	61.57
56	62.3	-9.79	62.665	63.52
57	68.5	-20.48	62.967	63.90
58	73.0	-17.75	63.518	62.75
59	76.8	-27.86	63.241	63.86
60	67.9	-19.37	64.348	66.22
67	69.2	-16.79	63.447	63.50
68	64.6	-20.40	62.211	63.58
69	64.2	-17.46	65.308	63.29
70	62.2	-13.77	62.827	64.60
71	66.9	-16.32	64.191	66.16
72	64.5	-13.42	60.748	65.36
76	73.9	-1.38	73.309	66.69
77	67.0	-23.12	69.677	71.93
78	70.2	-32.16	72.697	72.37
82	62.2	-4.68	62.663	79.73
83	57.7	-9.85	61.214	64.52
84	52.4	-9.24	52.360	37.81
85	50.5	-6.79	47.863	51.13
97	60.8	-22.22	64.738	65.22
98	60.0	-16.89	64.448	65.72
99	65.7	-12.59	65.250	65.09
103	65.3	-10.79	63.049	65.58

(Ex. APX 6; Ex. SDX 403; Ex. NPX 310).

And the following table illustrates that Act 603 increased the percentage of the black population in five of the majority-black Senate districts and decreased the percentage of the black population in the other three majority-black Senate districts.

Senate District Number	Act 2012-603 Total Black Pop. (%)	Overpop. (+) or Underpop. (-) of 2001 District Using 2010 Census Data (%)	2001 Senate Total Black Pop. (%)	1993 Senate Total Black Pop. (%)
18	59.12	-17.64	66.685	65.89
19	65.39	-20.06	66.227	63.00
20	63.38	-21.37	65.697	64.28
23	64.81	-18.03	62.305	63.46
24	63.30	-12.98	62.409	65.36
26	75.22	-11.64	71.507	70.34
28	59.96	-3.80	56.458	61.0
33	71.71	-18.05	62.451	65.34

(Ex. APX 7; Ex. NPX 310, Ex. NPX 312).

The following table illustrates the percentages of total black population and black voting-age population for each majority-black House district under Act 602 and the percentage of overall deviation in total population from ideal population for each majority-black House district.

House District Number	Act 2012-602 Total Black Pop. (%)	Act 2012-602 Voting-Age Black Pop. (%)	Deviation from Ideal Total Pop. (%)
19	61.5	60.15	-.97
32	60.3	57.68	-.04
52	60.1	57.21	-.96
53	56.2	52.98	-.91
54	56.9	52.50	-.99
55	73.6	70.60	-.99
56	62.3	59.71	-.99
57	68.5	65.96	-.99
58	73.0	67.99	-.95
59	76.8	74.28	-.67
60	67.9	65.68	-.96
67	69.2	65.73	-.97
68	64.6	61.82	-.99
69	64.2	61.83	-.10
70	62.2	57.13	.99
71	66.9	64.42	-.38
72	64.5	61.88	-.38
76	73.9	71.24	.99
77	67.0	64.20	.95
78	70.2	67.43	.96
82	62.2	60.48	.74

83	57.7	55.53	.99
84	52.4	50.99	.98
85	50.5	47.22	-.64
97	60.8	56.73	-.99
98	60.0	57.96	-.99
99	65.7	62.07	-.99
103	65.3	60.18	-.98

(Ex. APX 6; Ex. SDX 403).

The following table illustrates the percentages of total black population and black voting-age population for each majority-black Senate district under Act 603 and the percentage of overall deviation in total population from ideal population for each majority-black Senate district.

Senate District Number	Act 2012-603 Total Black Pop. (%)	Act 2012-603 Voting-Age Black Pop. (%)	Deviation from Ideal Total Pop. (%)
18	59.12	56.43	-.96
19	65.39	62.68	-.99
20	63.38	59.03	.99
23	64.81	61.67	.90
24	63.30	59.74	.85
26	75.22	72.70	-.08
28	59.96	58.03	.98
33	71.71	68.10	-.26

(Ex. APX 7; Ex. SDX 400).

The following table compares the percentages of black voting-age population for each majority-black House district using the 2010 Census data under Act 602 and under the 2001 plan.

House District Number	Act 2012-602 Voting-Age Black Pop. (%) Using 2010 Census Data	2001 House Plan Voting-Age Black Pop. (%) Using 2010 Census Data
19	60.15	67.70
32	57.68	56.62
52	57.21	58.52
53	52.98	52.49
54	52.50	53.37
55	70.60	71.22
56	59.71	59.42
57	65.96	66.52
58	67.99	74.02
59	74.28	64.25
60	65.68	65.15
67	65.73	65.59
68	61.82	59.97
69	61.83	61.99
70	57.13	56.31
71	64.42	62.04
72	61.88	57.52

76	71.24	67.48
77	64.20	71.48
78	67.43	72.57
82	60.48	54.19
83	55.53	55.51
84	50.99	49.23
85	47.22	45.64
97	56.73	57.35
98	57.96	62.23
99	62.07	70.09
103	60.18	64.83

(Ex. APX 6).

The following table compares the percentages of black voting-age population for each majority-black Senate district using the 2010 Census data under Act 603 and under the 2001 plan.

Senate District Number	Act 2012-603 Voting-Age Black Pop. (%) Using 2010 Census Data	Act 2001 Senate Plan Voting-Age Black Pop. (%) Using 2010 Census Data
18	56.43	57.31
19	62.68	69.31
20	59.03	74.44
23	61.67	61.79
24	59.74	59.38
26	72.70	70.87

28	58.03	49.82
33	68.10	61.55

(Ex. APX 7).

Most of the majority-black districts under the new plan remain underpopulated, but within 1 percent of the ideal population. Of the 28 majority-black House districts, 20 remain underpopulated. Six of the eight majority-black Senate districts remain underpopulated.

Because the Legislature used a tighter deviation in population compared to the Democrat-controlled Legislature in 2001, the number of black people and the percentage of the black population moved into majority-black districts were higher under the Acts than compared to those same numbers in 2001. In 2012, the Legislature moved 9.8 percent of the total black population into the majority-black House districts and 8.5 percent of the total black population into the majority-black Senate districts. (Ex. APX 6, 7). If the Democrat-controlled Legislature in 2001 had drawn the redistricting lines in accordance with an overall deviation in population of 2 percent, they would have needed to move 6.6 percent of the total black population into the majority-black House districts and 5.8 percent of the total black population into the majority-black Senate districts. The following table illustrates how the Legislature repopulated the majority-black House districts in 2001 and how many additional black people would have been required had that Legislature complied with the guideline of 2 percent deviation used in 2012.

HD #	Total Black Pop. in 2001 Plan	Deviation in 2001 Plan (%)	Total Black Pop. (%) in Plan	Black Pop. of Plan Using Census	Black People Moved To Create 2001 Plan	Act 602 Deviation from Ideal Total Pop. (%)	Black People Moved To Create 2001 Plan Using Act 602 Deviations (Redistribution / Total Black Pop.)
19	28,011	0.149	66.039	25,869	2,142	-0.97	1,947 / 27,816
32	24,975	-1.055	59.598	22,704	2,271	-0.04	1,631 / 24,335
52	27,716	-0.619	65.848	25,799	1,917	-0.96	1,088 / 26,887
53	26,247	-3.837	64.445	21,312	4,935	-0.91	5,848 / 27,161
54	25,563	-4.614	63.276	20,153	5,410	-0.99	6,494 / 26,647
55	27,344	-4.736	67.772	27,217	127	-0.99	1,323 / 28,540
56	26,546	0.021	62.665	23,896	2,650	-0.99	2,493 / 26,389
57	25,373	-4.857	62.967	28,593	-3,220	-0.99	-2,076 / 26,517
58	25,937	-3.587	63.518	24,284	1,653	-0.95	2,475 / 26,759
59	25,449	-4.987	63.241	20,459	4,990	-0.67	6,259 / 26,718
60	26,693	-2.057	64.348	23,455	3,238	-0.96	3,651 / 27,106
67	25,663	-4.498	63.447	23,358	2,305	-0.97	3,366 / 26,724
68	25,227	-4.255	62.211	23,051	2,176	-0.99	3,147 / 26,198
69	26,417	-4.493	65.308	25,198	1,219	-0.10	2,552 / 27,750
70	26,587	-0.083	62.827	23,375	3,212	0.99	3,612 / 26,987
71	25,872	-4.836	64.191	24,041	1,831	-0.38	3,158 / 27,199
72	25,561	-0.652	60.748	24,825	736	-0.38	914 / 25,740
76	30,117	-3.001	73.309	29,655	462	0.99	1,834 / 31,489
77	28,546	-3.268	69.677	23,986	4,560	0.95	5,931 / 29,917
78	29,390	-4.545	72.697	23,911	5,479	0.96	7,306 / 31,217
82	27,605	4.014	62.663	30,493	-2,888	0.74	-3,643 / 26,850
83	24,651	-4.918	61.214	26,144	-1,493	0.99	161 / 26,305
84	21,696	-2.165	52.360	16,235	5,461	0.98	6,254 / 22,489
85	19,964	-1.516	47.863	16,934	3,030	-0.64	3,293 / 20,227
97	27,667	.907	64.738	24,414	3,253	-0.99	2,848 / 27,262
98	27,393	.357	64.448	22,935	4,458	-0.99	4,205 / 27,140
99	27,674	.139	65.250	25,950	1,724	-0.99	1,528 / 27,478
103	26,570	-.498	63.049	25,832	738	-0.98	722 / 26,554

(Ex. CE 30; CE 32; SDX 403).

The following table illustrates how the Legislature repopulated the majority-black districts in the Senate in 2001 and how many additional black people would have been required had that Legislature complied with the guideline of 2 percent deviation used in 2012.

SD #	Total Black Pop. in 2001 Plan	Deviation in 2001 Plan (%)	Total Black Pop.(%) In 2001 Plan	Black Pop. of 1993 Plan Using 2000 Census	Black People Moved To Create 2001 Plan	Act 603 Deviation from Ideal Total Pop. (%)	Black People Moved To Create 2001 Plan Using Act 603 Deviations (Redistribution / Total Black Pop.)
18	82,769	-2.577	66.865	67,264	15,505	-0.96	16,879 / 84,143
19	80,662	-4.142	66.227	79,706	956	-0.99	3,609 / 83,315
20	80,075	-4.072	65.697	68,198	11,877	-0.99	14,450 / 82,648
23	75,380	-4.781	62.305	71,607	3,773	-0.90	6,845 / 78,452
24	75,520	-4.762	62.409	72,245	3,275	0.85	7,726 / 79,971
26	92,486	1.794	71.507	77,552	14,934	-0.08	13,250 / 90,802
28	71,653	-0.116	56.458	72,872	-1,219	0.98	-433 / 72,439
33	79,492	.179	62.451	73,299	6,193	-0.26	5,845 / 79,144

(Ex. APX 4; CE 34; Ex. SDX 400).

Although the Constitution of Alabama prohibits the division of a county among districts, *see* Ala. Const. Art. IX, § 200, the final plans split some counties to comply with the overall deviation in population of 2 percent used to satisfy the federal requirement of one person, one vote. The final plans split 33 counties for the Senate districts and 50 counties for the House districts. The 1993 plans split 32 counties for Senate districts and 36 counties for the House districts, and the 2001 plans split 31 counties for the Senate districts and 39 counties for the House districts. But those earlier plans used an overall deviation in population of 10 percent. (Ex. APX 62).

Other counties were split to further the interests of incumbents. For example, Representative Alan Harper, who switched to the Republican Party in 2012, asked to have his district include a portion of Greene County in which he owned property. (Hinaman Depo. 68, June 25, 2013). Representative Harper stated that he might move to that property in the future, and the representative whose district had previously included that property agreed to a change in which 12 people were moved to District 61. (Hinaman Depo. 68, June 25, 2013). The rest of Greene County is divided between Districts 71 and 72.

The final plan also kept incumbent conflicts to a minimum. No two incumbent Senators were in the same district. The House plan had only two incumbent conflicts. Two black incumbent Democrats, Representative Juandalynn Givan and Representative

Demetrius Newton, lived in District 60. Representative Demetrius Newton has since died. Another black incumbent Democrat, Representative John Knight, and a white incumbent Democrat, Representative Joe Hubbard, lived in District 77, but Representative Hubbard has since moved to District 74. The former incumbent conflict was the result of the decision to move District 53 to Huntsville and use its former population to repopulate the majority-black districts in Jefferson County, and the latter incumbent conflict was the result of the decision to move District 73 to Shelby County and use its former population to repopulate the majority-black districts in Montgomery County.

h. Adoption of the Acts into Law

The Alabama Legislature considered the proposed districts in a special session that began on May 17, 2012, and ended on May 24, 2012. (Joint Stip. 6). The Legislature made only minor changes to the bills during that week. The bills proceeded along the normal legislative process through committees and debate on the floor of each house of the Legislature. Democratic legislators offered substitute plans in committee and on the floors of both houses of the Legislature, but none of their plans complied with the guideline of an overall deviation in population of 2 percent adopted by the Committee. Senator Hank Sanders (D) introduced HB16 and SB5 as alternatives, both of which were drafted with an overall deviation of 10 percent. Those plans placed several

incumbents in the same districts, and those plans included 27 majority-black House districts. All of the proposed substitutes were defeated.

Both houses of the Legislature approved the Acts, and the Governor signed them into law. The Senate approved its new districts by a vote of 20 to 13 along party lines, with an Independent, Harri Ann Smith, joining the Democrats in the minority. (Ex. NPX 315). The Senate approved the new House districts by a vote of 23 to 12 along party lines, with the Independent joining the Republicans in the majority. (Ex. NPX 314). The House approved its new districts by a vote of 66 to 35, with one Democrat, Charles Newton, voting in favor of the plan and three Democrats abstaining from voting. (Ex. NPX 314). The House approved the new Senate districts by a vote of 61 to 34 along party lines, with 4 Republicans and 5 Democrats abstaining from the vote. (Ex. NPX 314). Governor Bentley signed the Acts into law on May 31, 2012.

4. Evidence Presented by the Plaintiffs at Trial

At trial, the plaintiffs introduced the live testimony of 13 lay witnesses and 3 expert witnesses. The lay witnesses included Senator Tammy Irons (D); Senator Mark Keahey (D); Senator Rodger Smitherman (D); Senator Vivian Davis Figures (D); Senator Quinton Ross (D); Representative Laura Hall (D); Representative Joe Hubbard (D); Democratic Conference plaintiff

Lynn Pettway; Democratic Conference plaintiff Rosa Toussaint; Democratic Conference plaintiff Framon Weaver; Democratic Conference plaintiff Isabel Rubio; the Chairman of the Alabama Democratic Conference, Dr. Joe Reed; and the President of the Alabama Chapter of the National Association for the Advancement of Colored People, Bernard Simelton. The expert witnesses included William S. Cooper, who drew alternative maps for the Black Caucus plaintiffs; Allan J. Lichtman, who testified about racial polarization in Alabama elections; and Theodore S. Arrington, who testified that, in his opinion, the Acts packed black voters into majority-black districts to isolate and diminish their political strength.

a. Testimony of Senator Tammy Irons

Senator Tammy Irons (D) testified that, in her opinion, the only explanation for the changes made to her district in Act 603 is an intent to "crack" a minority-opportunity district in Senate District 7. (Trial Tr. vol. 1, 149-51, Aug. 8, 2013). She explained that her old district included all of Lauderdale County and part of Colbert County, a community of interest commonly known as "the Shoals," but that her new district includes only a portion of Lauderdale County, a strip of land in the northern portion of Limestone County that used to belong to District 2, and a section of Madison County heavily populated by minorities that used to belong to District 7. (Trial Tr. vol. 1, 148-51, Aug. 8, 2013). According to the 2010 Census, Senate District 7 had a voting-age population that was 62.61

percent white and 30.90 percent black. (Ex. NPX 351). Under Act 603, Senate District 7 will have a voting-age population that is 67.83 percent white and 26.14 percent black. (Ex. NPX 361; Ex. NPX 362). According to the 2010 Census, Senate District 1 had a voting-age population that was 84.93 percent white and 12.20 percent black. (Ex. NPX 351). Under Act 603, Senate District 1 will have a voting-age population that is 85.56 percent white and 10.66 percent black. (Ex. NPX 361; Ex. NPX 362).

Senator Tammy Irons also testified that she believes that the Republican Party has a culture of hate toward women and minorities. (Trial Tr. vol. 1, 180, Aug. 8, 2013). As support for this point, she testified that Republicans attempted to invoke the rule of cloture 48 times in 2011 and were successful 43 times, which in her view had the effect of silencing the voices of women and minorities. (Trial Tr. vol. 1, 181, Aug. 8, 2013). She also testified that she based her opinion on laws she had read, but did not provide any specific examples. (Trial Tr. vol. 1, 166, Aug. 8, 2013). And she testified that, although she expressed her opinion to officials of the Department of Justice, Attorney General Holder later precleared the Acts. (Trial Tr. vol. 1, 178, Aug. 8, 2013).

We do not doubt that Senator Tammy Irons testified truthfully about her opinions, but we do not credit her conclusions about the changes to her district or about the Republican Party. The population statistics for the districts in the northern portion of the State reveal the overpopulation of Senate District

7 and all of the districts surrounding it. (Ex. APX 7). Senator Dial and Hinaman testified consistently that the significant overpopulation of the northern districts, as well as the underpopulation of the majority-black districts in the Black Belt caused a domino effect that required changes to Senate District 7. (Trial Tr. vol. 1, 35, 48, Aug. 8, 2013; Hinaman Decl.; Hinaman Depo. 31-32, June 25, 2013). And the decision to invoke the rule of cloture to pass legislation that is being filibustered by a minority party is not an invidiously discriminatory tactic.

b. Testimony of Senator Marc Keahey

Senator Marc Keahey (D) also testified on behalf of the plaintiffs. Senator Keahey represents District 22, a sprawling district in southwest Alabama. (Trial Tr. vol. 1, 182, Aug. 8, 2013; Ex. APX 48; Ex. APX 49). He testified that, after the landslide elections for the Republicans in 2010, he was, at 17 months, the second-longest serving white Democrat in the Senate. (Trial Tr. vol. 1, 183, Aug. 8, 2013). District 22 was a crossover district because its voting-age population in 2010 was only 27.50 percent black, but the district elected a Democrat preferred by black voters. (Ex. APX 7; Tr. Trans. vol. 1, 182, Aug. 8, 2013). Under Act 603, District 22 has a voting-age population that is 20.70 percent black. (Ex. APX 7). Senator Keahey testified that, after he saw the working draft of the new districts, he brought several proposed amendments to Senator Dial, all of which Senator Dial rejected on the ground that the changes would result in

the retrogression of Districts 23 and 24 to the north, majority-black districts represented by Senator Hank Sanders (D) and Senator Bobby Singleton (D) respectively. (Trial Tr. vol. 1, 188-90, Aug. 8, 2013). Some of Senator Keahey's proposed amendments would have placed all of the MOWA Band of Choctaw Indians in the same district. (Trial Tr. vol. 1, 199, Aug. 8, 2013). He also testified that, when he asked for changes to the districts, other senators asked him to switch parties, but he declined. (Trial Tr. vol. 1, 199-200, Aug. 8, 2013). We credit Senator Keahey's testimony.

c. Testimony of Senator Rodger Smitherman

Senator Rodger Smitherman (D), who represents majority-black Senate District 18 in Birmingham, testified that the new districts were unfair to the voters of Jefferson County because of the structure of the local delegation, which is composed of every legislator who represents voters in Jefferson County. (Trial Tr. vol. 2, 11, 15-16, Aug. 9, 2013). Under both the 2001 Senate plan and Act 603, Jefferson County residents vote in eight Senate districts, three of which are majority-black districts and five of which are majority-white districts. (Trial Tr. vol. 2, 7-8, Aug. 9, 2013; Ex. APX 17). But Act 602 changes the House districts in Jefferson County because it moves one majority-black district to Huntsville and moves an additional majority-white district into the County. Under the previous House plan, residents of Jefferson County had voted in nine majority-black districts

and nine majority-white districts. (Trial Tr. vol. 2, 7, Aug. 9, 2013; Ex. APX 41). Under the new House plan, residents of Jefferson County will vote in eight majority-black districts and ten majority-white districts. Because the new majority-white district that crosses into Jefferson County includes a Democratic incumbent as a resident, the partisan balance of the districts remains the same. (Trial Tr. vol. 2, 7, 23-24, Aug. 9, 2013).

Senator Smitherman testified that, in his view, the balance of the Jefferson County local delegation is unfair to black residents of Jefferson County and dilutes their voting power. (Trial Tr. vol. 2, 11, 13, Aug. 9, 2013). Local delegations act as gatekeepers for county legislation in the Legislature, which ordinarily will not consider or pass local legislation not approved by the local delegation. (Trial Tr. vol. 2, 15-16, Aug. 9, 2013). Although black voters in Jefferson County are ordinarily successful in electing their preferred candidates in county-wide elections, they are unable to exercise the same control over the local delegation because of the influence of suburban voters on many of its members. (Trial Tr. vol. 2, 15-16, Aug. 9, 2013). As an example, Senator Smitherman cited an occupational tax supported by the senators elected by the majority-black districts within Jefferson County, but opposed by the senators elected by majority-white districts that extend to suburban counties, where many people commute to work in Birmingham. (Trial Tr. vol. 2, 16-17, Aug. 9, 2013). Because a majority of the local delegation opposed the occupational tax, the

Legislature did not pass it. (Trial Tr. vol. 2, 16-17, Aug. 9, 2013). Senator Smitherman testified that, as a result of the failed tax, Jefferson County closed Cooper Green Mercy Hospital, a charitable hospital for the indigent that formerly served many of his constituents. (Trial Tr. vol. 2, 19-21, Aug. 9, 2013). Senator Smitherman also testified that the failure to pass the occupational tax had resulted in a loss of security jobs at the state courthouses in Jefferson County. (Trial Tr. vol. 2, 18-19, Aug. 9, 2013).

Senator Smitherman acknowledged that he provided Senator Dial with a map for the majority-black Senate districts in Jefferson County and that Senator Dial adopted the substantial majority of that map. (Trial Tr. vol. 2, 29-30, 40-41, Aug. 9, 2013). Senator Smitherman asked Senator Dial to maintain a similar racial balance in the district, and Senator Dial agreed that he would try to accommodate that request, so long as doing so would not result in retrogression in other districts. (Trial Tr. vol. 2, 25, Aug. 9, 2013). As of 2010, Senate District 18 had a black voting-age population of 57.31 percent, and under Act 603, District 18 has a black voting-age population of 56.43 percent. (Ex. APX 7; Ex. NPX 362).

We credit most of Senator Smitherman's testimony. We credit his testimony about the makeup of the local delegation for Jefferson County and his testimony that the occupational tax failed because of opposition from legislators who represent suburban counties. And we credit Senator Smitherman's testimony that he provided Senator Dial a proposed map

of the majority-black Senate districts in Jefferson County and that Senator Dial incorporated a majority of that map into the new districts. But we cannot credit Senator Smitherman's testimony that Act 603 dilutes the votes of the black population of Jefferson County as that testimony calls for a legal conclusion that we must decide for ourselves.

d. Testimony of Senator Vivian Davis Figures

Senator Vivian Davis Figures (D), who represents District 33, a majority-black district in Mobile County, testified on behalf of the plaintiffs. (Trial Tr. vol. 2, 43, Aug. 9, 2013). Senator Figures served on the Reapportionment Committee and testified that, when the Committee met to establish guidelines for redistricting, the Democratic members of that Committee had favored an overall deviation in population of 10 percent because it allowed for more leeway, but the Republican members of the Committee favored a lower overall deviation in population because of the decision in *Larios*. (Trial Tr. vol. 2, 46-49, Aug. 9, 2013). She testified that she had no input in the creation of her district and that she never asked for the black voting-age population to be increased in her district, but that the final plan increased the black voting-age population in her district from 61.55 percent to 68.10 percent. (Trial Tr. vol. 2, 45-46, Aug. 9, 2013; Ex. APX 7). She testified that, although she had not examined the boundaries of her district, she knew it was packed. (Trial Tr. vol. 2, 50, Aug. 9, 2013).

Senator Figures testified that, since the Republican takeover of the Legislature in 2010, she has felt that she has not had a voice in the Senate. (Trial Tr. vol. 2, 51, Aug. 9, 2013). She explained that she has served in the Legislature for 17 years and is the Senate Minority Leader, but that the Republican supermajority is able to invoke the rule of cloture and end debate on controversial issues. (Trial Tr. vol.2, 51-55, Aug. 9, 2013). For example, Senator Figures explained that she had asked the Senate Majority Leader not to close debate on the last version of the Alabama Accountability Act – a controversial education bill – because she and some other Democratic senators wanted to propose amendments to the bill, but a different Republican Senator filed a cloture petition and the Democrats were not able to introduce amendments. (Trial Tr. vol. 2, 52-53, Aug. 9, 2013).

Senator Figures testified that she also felt her voice was silenced during the passage of the new Senate districts, but she admitted on cross-examination that many of the incidents she had cited as examples occurred for race-neutral reasons. For example, she testified that she had not seen the final version of the bill until the day it was introduced on the Senate floor, but she admitted that she had seen the first plan of the new Senate districts two weeks before the Acts were passed and that the only changes made to the second plan were minor alterations to put two Democratic senators back in their districts because Senator Dial and Hinaman had inadvertently drawn those senators out of their districts in the initial plan.

(Trial Tr. vol. 2, 62-64, Aug. 9, 2013; Ex. CE 24). And she testified that debate on the Senate plan had been cut off, but she also admitted that, under the Senate rules, a vote had to be immediately taken on the bill when her Democratic colleague, Senator Keahey, asked for the bill to be read at length a third time. (Trial Tr. vol. 2, 61-62., Aug. 9, 2013). She agreed that Senator Keahey's request to have the bill read at length for the third time, not any action by the Republicans, had the effect of cutting off debate on the redistricting Acts. (Trial Tr. vol. 2, 62, Aug. 9, 2013).

We credit most of Senator Figures's testimony. We credit her testimony that the Democratic members of the Committee voted in favor of a higher overall deviation in population because it would give more leeway to meet other priorities and that the Republican members favored a lower overall deviation in population because of *Larios*. (Trial Tr. vol. 2, 49, Aug. 9, 2013). We credit her testimony that she did not meet with Hinaman or otherwise give input about her district and that she never requested an increase in the percentage of the black population in her district. (Trial Tr. vol. 2, 45-46, Aug. 9, 2013). And we credit her testimony that she believes that her voice has been silenced because the Republicans are able to and have invoked cloture on multiple occasions, including during consideration of the Alabama Accountability Act. (Trial Tr. vol. 2, 51-55, Aug. 9, 2013). But we do not credit her testimony that her district is packed because that testimony amounts to a legal conclusion.

e. Testimony of Senator Quinton Ross

Senator Quinton Ross (D) also testified on behalf of the plaintiffs. Senator Ross represents Senate District 26, a majority-black district in Montgomery. (Trial Tr. vol. 2, 123, Aug. 9, 2013). He testified that he had some limited conversations with Senator Dial about the redistricting plans, but never sat down with Hinaman to draw his district. (Trial Tr. vol. 2, 124, Aug. 9, 2013). And he testified that the percentage of black population in his district is much higher than it was under the 2001 plan. (Trial Tr. vol. 2, 127, Aug. 9, 2013). He testified that Act 603 split several precincts in his district, which will have a major economic impact on Montgomery County because it will require the County to hire new personnel for the voting precincts. (Trial Tr. vol. 2, 134-35, Aug. 9, 2013).

Senator Ross testified that the Republican supermajority has abused its power. He used, as an example, the procedures followed by the Republican supermajority when they passed the education bill known as the Alabama Accountability Act. (Trial Tr. vol. 2, 135-41, Aug. 9, 2013). He explained that an initial draft of the bill that had passed the Senate and passed, with some alterations from the House, was only eight pages and had broad support from the Democratic members of the Legislature, but that the Republican members of the conference committee substituted a significantly longer bill for it over the objections of the Democratic members of the committee. (Trial Tr. vol. 2, 135-38, Aug. 9, 2013). The Republican supermajority of the Legislature then passed

the conference bill over the strenuous objections of the Democrats. (Trial Tr. vol. 2, 138-41, Aug. 9, 2013).

We credit most of Senator Ross's testimony. We credit his testimony that he was never given the opportunity to work on his district with Hinaman, but we rely on the statistics introduced into evidence about his districts instead of his description of those statistics. In 2010, the total population of Senate District 26 was 72.75 percent black, and the voting-age population was 70.87 percent black. (Ex. APX 7). Under Act 603, the total population of Senate District 26 is 75.22 percent black, and the voting-age population is 72.70 percent black. (Ex. APX 7; Ex. SDX 400). And we credit Senator Ross's testimony about the procedures used by the Republicans when they passed the Alabama Accountability Act, but not his opinion that the procedures amounted to an abuse of power.

f. Testimony of Representative Laura Hall

Representative Laura Hall (D) also testified on behalf of the Democratic Conference plaintiffs. Representative Hall represents House District 19 in Madison County. (Trial Tr. vol. 3, 6, Aug. 12, 2013). In 2010, the total population of House District 19 was 70.04 percent black. (Ex. APX 6). Under the new plans, District 19 gained some rural population, and the percentage of black population decreased to 61.5 percent. (Ex. APX 6). Representative Hall testified

that she met with Representative McClendon to discuss possible areas in which her district could gain additional population because it was underpopulated, but she did not sit with Hinaman at a computer to consider different options. (Trial Tr. vol. 3, 22-24, Aug. 12, 2013).

Representative Hall also testified about the changes to Senate District 7 because she ran as the Democratic nominee for that district in 2010, but she lost in the general election to Senator Paul Sanford (R). (Trial Tr. vol. 3, 8-9, Aug. 12, 2013). Under the 2001 plan, District 7 included a strip of land in the middle of Madison County from the Alabama-Tennessee border down the center of the County through Huntsville. (Trial Tr. vol. 3, 11, Aug. 12, 2013; Ex. SDX 477). The district included most of urban Huntsville. (Trial Tr. vol. 3, 12, Aug. 12, 2013; Ex. SDX 476). Representative Hall testified that the new plan moved a portion of southwest Huntsville, which is sometimes called "Little Mexico" because it has a "very viable" Hispanic community, into Senate District 2 and moved a portion of northwest Huntsville, which is predominantly black, into Senate District 1. (Trial Tr. vol. 3, 13-16, Aug. 12, 2013; Ex. NPX 353C). Senator Bill Holtzclaw (R) represents District 2, and Senator Tammy Irons (D) represents District 1. Representative Hall agreed that the "socioeconomic community interests" of the black population moved into Senator Irons's district is different from the black population formerly in Senator Irons's district because the black population in Huntsville "has a high

population of engineers [and] scientists" whereas the Florence area has "a very hard-working union type of community." (Trial Tr. vol. 3, 21-22, Aug. 12, 2013).

Representative Hall testified that Act 603 provides less favorable opportunities for minorities in Huntsville than alternative plans advanced by the plaintiffs, (Trial Tr. vol. 3, 18-20, Aug. 12, 2013), but she also acknowledged that all of the alternative plans follow an overall deviation in population of 10 percent, (Trial Tr. vol. 3, 35, Aug. 12, 2013). Under Act 603, Senate District 7 is overpopulated by just under 1 percent and has a total population that is 65.56 percent white, 27.34 percent black, and 2.58 percent other. (Ex. SDX 400). The voting-age population is 67.83 percent white and 26.14 percent black. (Ex. NPX 362). Under an alternative plan proposed by Dr. Reed, District 7 would be underpopulated by 2.81 percent, and the proposed district would have a total population that is 47.17 percent black, 43.58 percent white, and 3.69 percent other. (Ex. CE 48). The plaintiffs failed to provide the Court with voting-age statistics for that plan. The illustrative district introduced by the Democratic Conference plaintiffs would be underpopulated by 4.96 percent and would have a total population that is 42.02 percent white, 48.36 percent black, and 7.29 percent Hispanic. (Ex. NPX 302). The illustrative district would have a voting-age population that is 45.18 percent white, 46.45 percent black, and 6.51 percent Hispanic. (Ex. NPX 302). Representative Hall testified that both the plan proposed by Dr. Reed and the Democratic Conference

illustrative district would allow black and Hispanic voters to form a coalition to reach 50 percent, but Act 603 has a smaller minority population. (Trial Tr. vol. 3, 18-19, Aug. 12, 2013).

And Representative Hall testified about a voter-suppression incident that occurred in Senate District 7 during the last general election. Although she initially testified that a conservative radio show host tried to suppress votes in District 7 during the general election by sending out a flier with the seal of the Secretary of State that Republicans should vote Tuesday and African Americans should vote Wednesday, (Trial Tr. vol. 3, 9, Aug. 12, 2013), she acknowledged on cross-examination that the announcement was about Republicans and Democrats, not race. (Trial Tr. vol. 3, 36, Aug. 12, 2013). And she acknowledged that the Secretary of State countered that misinformation and told the radio show host to cease and desist, but Representative Hall insisted that the damage had already been done. (Trial Tr. vol. 3, 36, Aug. 12, 2013). Plaintiffs offered no evidence that any State official had anything to do with the actions of the radio show host.

Representative Hall also testified, like several of her other Democratic colleagues, that she is upset about the ability of the Republican supermajority in the Legislature to invoke cloture. (Trial Tr. vol. 3, 32, Aug. 12, 2013). She testified about her dissatisfaction with the process by which the Republicans passed the Alabama Accountability Act. (Trial Tr. vol. 3, 27-32, Aug. 12, 2013). And she testified that she felt

that she had been "clotured more during this last quadrennium than the entire 20 years [she had] been in session." (Trial Tr. vol. 3, 32, Aug. 12, 2013). Under the new Republican supermajority, Representative Hall explained that she views it as challenging at best *to* advocate on behalf of her district. (Trial Tr. vol. 3, 32, Aug. 12, 2013). She testified that she has not been asked to switch parties, but that she would not be very happy as a Republican. (Trial Tr. vol. 3, 32, 36, Aug. 12, 2013).

We credit most of Representative Hall's testimony. We credit her testimony that she discussed her district with Representative McClendon, but did not sit down with Hinaman to discuss potential changes. We credit her testimony that some of the minorities who previously resided in Senate District 7 reside in new districts under Act 603 and that those minorities will probably be less able to elect the candidate of their choice under Act 603 than in the illustrative districts. And we credit her testimony that the Republicans have invoked the rule of cloture to end debate by the Democrats. We do not credit her initial testimony that the fliers were directed at only African Americans because it is inconsistent with her later acknowledgement that the flier was about Democratic voters and with the testimony of Senator Irons about the incident. (Trial Tr. vol. 4, 153, Aug. 13, 2013).

g. Testimony of Representative Joe Hubbard

Initially elected in 2010, Representative Joe Hubbard (D) testified for the Democratic Conference plaintiffs. Representative Hubbard represents House District 73, which Act 602 moved from Montgomery County to Shelby County. (Trial Tr. vol. 3, 37-38, Aug. 12, 2013). He testified that, after he had voted with Republicans on a controversial jobs bill, the Republican Speaker of the House, Mike Hubbard, told him that if he "played [his] cards right, [he] could have a long future in the Alabama House of Representatives." Representative Hubbard assumed that the Speaker was asking him to switch parties, given that the Speaker's chief of staff previously had extended that invitation. (Trial Tr. vol. 3, 40-41, Aug. 12, 2013). After he rejected that invitation, the Committee introduced a new House plan, in which District 73 had been moved to Shelby County. (Trial Tr. vol. 3, 41-42, Aug. 12, 2013). Representative Hubbard testified that he tried to get the agreement of the other representatives in Montgomery County to reconstitute some of the neighborhoods he had represented, but that Representative Jay Love (R), who has since resigned his position, rejected the proposed amendments because they would have reduced the percentage of the voting-age population in District 74 that was white. (Trial Tr. vol. 3, 42-43, Aug. 12, 2013). Representative Hubbard has purchased a new home in District 74, the majority-white district formerly

represented by Representative Love. (Trial Tr. vol. 3, 45-46, Aug. 12, 2013). We credit this testimony.

h. Testimony of Dr. Joe Reed

The Democratic Conference plaintiffs also introduced the testimony of Dr. Joe Reed, who appeared as a representative of the Alabama Democratic Conference. (Trial Tr. vol. 2, 153, Aug. 9, 2013). He testified that the Alabama Democratic Conference is an organization of Democrats founded in 1960 to advance the political influence of blacks in Alabama. (Trial Tr. vol. 2, 153-54, Aug. 9, 2013). The organization is involved in voter registration and lobbying and, according to Reed, has chapters in most of the counties in Alabama. (Trial Tr. vol. 2, 153, 159, Aug. 9, 2013). In those counties where the Conference does not have chapters, the Conference has at least a contact. (Trial Tr. vol. 2, 159, Aug. 9, 2013). The Conference endorses candidates in almost every race for the Legislature. (Trial Tr. vol. 2, 159-160, Aug. 12, 2013).

Reed testified that he has been involved in redistricting in Alabama since the 1970s and that he became involved to elect black candidates. (Trial Tr. vol. 2, 154-56, Aug. 9, 2013). He testified that, for a long time, he believed that a district needed to be at least 65 percent black to allow the black voters to elect the candidate of their choice because some blacks either are not registered to vote or are ineligible to vote. (Trial Tr. vol. 2, 156-57, Aug. 9, 2013). And he testified that he now believes that a district should be about

60 percent black to allow the voters to elect their candidate of choice, although in some circumstances the percentage may need to be closer to 65 percent. (Trial Tr. vol. 2, 156-58, Aug. 9, 2013).

Reed testified that he drafted an alternative plan for the Alabama Legislature, which he showed Senator Dial at one of the public hearings. (Trial Tr. vol. 2, 164-65, Aug. 9, 20913; Ex. CE 42; Ex. CE 45). He testified that he viewed the plan as a "status quo plan." (Trial Tr. vol. 2, 165, Aug. 9, 2013). He testified that he tried only to satisfy incumbents and meet the requirement of one person, one vote. (Trial Tr. vol. 9, 165, Aug. 9, 2013). To accomplish the latter objective, he used an overall deviation of 10 percent because that is the deviation that the Legislature had used in the 2001 plan. (Trial Tr. vol. 2, 165, Aug. 9, 2013). With this deviation, he was able to keep District 73 in Montgomery County, but reduce the black population in that district. (Trial Tr. vol. 9, 165-66, Aug. 9, 2013). Despite his efforts to satisfy all incumbents, his plan caused one incumbent conflict in the House. (Trial Tr. vol. 2, 166, Aug. 9, 2013).

He testified that, as compared to his plans, the plans adopted by the Legislature were bad for both blacks and whites. (Trial Tr. vol. 2, 167-68, Aug. 9, 2013). He explained that the adopted plans will cause significant problems for boards of registrars because of the county and precinct splits, (Trial Tr. vol. 2, 168, Aug. 9, 2013), but he also acknowledged that the boards of registrars had fulfilled their duties when the plans adopted in 1993 and 2001 split counties and

precincts (Trial Tr. vol. 2, 171-73, Aug. 9, 2013). And he testified that the new plans would cause confusion for voters for the same reasons, (Trial Tr. vol. 2, 168, Aug. 9, 2013), but acknowledged that the boards of registrars were required by law to send postcards to voters about their polling places and that he could challenge any failure to do so in court, (Trial Tr. vol. 2, 173-74, Aug. 9, 2013). Reed asked the Court to send the issue of redistricting back to the Legislature and tell it to apply an overall deviation in population of 10 percent. (Trial Tr. vol. 2, 169-70, Aug. 9, 2013).

We credit most of Reed's testimony. We credit Reed's testimony that redistricting is an inherently political process and that a drafter can draw a plan in many ways. We credit Reed's testimony that he formerly believed that a larger black population was often needed to guarantee black voters the opportunity to elect their candidate of choice than he now believes is necessary. And we credit Reed's testimony about his redistricting plan and about the reaction of registrars to the precinct splits in the 1993 and 2001 redistricting plans, but we do not credit his testimony that the plans adopted by the Legislature are bad for all black and white citizens of Alabama.

i. Testimony of Lynn Pettway

Lynn Pettway testified as one of the Democratic Conference plaintiffs. He explained that he resides in House District 73, which had experienced significant minority growth between 2000 and 2010 and had

elected Joe Hubbard, a white Democrat, in 2010. (Trial Tr. vol. 2, 177-79, Aug. 9, 2013). Pettway agreed that, based on the statistics of Montgomery County in 2010, the majority-black districts needed to gain population and that the districts in Shelby County needed to lose population, (Trial Tr. vol. 2, 186, 189-91, Aug. 2, 2013), but he was dissatisfied with the decision to move District 73 to address this problem, (Trial Tr. vol. 2, 185, Aug. 9, 2013). Pettway offered no alternative plan, but asserted that he believed that another approach could have been taken to keep his district in place. (Trial Tr. vol. 2, 189, Aug. 9, 2013).

We credit most of Pettway's testimony. We credit Pettway's testimony that he resides in District 73, that he believes that the minority population in that district has increased over the last ten years, and that he is dissatisfied with the redistricting plans. (Trial Tr. vol. 2, 177-79, 185, Aug. 9, 2013). But we rely on the census to determine the shift in demographics of his district and the feasibility of maintaining District 73 within Montgomery County.

j. Testimony of Rosa Marie Toussaint

Rosa Marie Toussaint also testified as one of the Democratic Conference plaintiffs. Toussaint voted in House District 19 under the districts established in 2001, but will vote in House District 10 under Act 602. (Trial Tr. vol. 4, 32-33, Aug. 13, 2013). Toussaint is a black citizen of Hispanic ethnicity. (Trial Tr. vol. 4, 19, Aug. 13, 2013). Toussaint lives in the Huntsville

area and is a member of the Hispanic-Latino Advisory Committee, a member of the Hispanic American International Chaplain Association, and a member of the National Association for the Advancement of Colored People. (Trial Tr. vol. 4, 20-21, Aug. 13, 2013). She testified that she worked on Representative Laura Hall's successful campaign for House District 19 and her unsuccessful campaign for Senate District 7. (Trial Tr. vol. 4, 23, Aug. 13, 2013). Toussaint translated campaign signs into Spanish to reach out to the Hispanic community in Huntsville and met weekly with several black and Hispanic leaders to build a coalition between those two groups. (Trial Tr. vol. 4, 24-25, Aug. 13, 2013). She testified that she believes her efforts have been successful and that she believes the black and Hispanic communities in Huntsville vote for Democratic candidates. (Trial Tr. vol. 4, 27, Aug. 13, 2013). And she testified that the new Senate District 7 would give Hispanic voters less of an opportunity to elect the candidate of their choice than the alternative illustrative districts provided by the plaintiffs. (Trial Tr. vol. 4, 27-28, Aug. 13, 2013). She testified that, under either the alternative plan proposed by Reed or the illustrative District 7 introduced by the Democratic Conference plaintiffs, Hispanic voters would have a reasonable opportunity, working in coalition with black voters, to elect a candidate of their choice. (Trial Tr. vol. 4, 27-28, Aug. 13, 2013).

We credit much of Toussaint's testimony. We credit her testimony that she worked on Hispanic

outreach for Representative Hall's campaign and that she believes her efforts were successful. We also credit her testimony that many Hispanic voters in the Huntsville area have voted in a coalition with the black population. But we do not credit her opinion testimony about whether Hispanics in Huntsville would be able to elect the candidate of their choice under any of the plans presented because she did not offer any factual basis to support her opinion that the candidate of choice for the Hispanic population would necessarily be the same candidate of choice for the black population. Her testimony that Hispanics and blacks have worked together in a political coalition in Huntsville does not, by itself, prove that the candidate of choice for the Hispanic population would regularly be the same candidate of choice for the black population.

k. Testimony of Framon Weaver

Framon Weaver testified as a Democratic Conference plaintiff. Weaver is the Chief of the MOWA Band of Choctaw Indians, which has approximately 4,000 members in the State of Alabama. (Trial Tr. vol. 4, 41, Aug. 13, 2013). The State of Alabama has recognized the MOWA Band of Choctaw Indians, but the federal government has not. (Trial Tr. vol. 4, 39, 47, Aug. 13, 2013). The Band lives along the border between Washington County and Mobile County. (Trial Tr. vol. 4, 40-41, Aug. 13, 2013; Ex. NPX 353-M). Weaver testified that the Band has worked closely with black groups on political campaigns and that

the Band has predominantly supported Democratic candidates. (Trial Tr. vol. 4, 42-44, Aug. 13, 2013). And he testified that, although the Band was able to elect its candidate of choice in coalition with blacks in the old Senate District 22, it will not be able to do so under the Acts because the Band is split between three different Senate districts – District 22, 23, and 34-and the black population is predominantly in District 23. (Trial Tr. vol. 4, 44-46, Aug. 13, 2013).

We credit most of Weaver's testimony. We credit Weaver's testimony that he has been elected the Chief of this state-recognized Band, and we credit Weaver's testimony about the size and location of the Band. And we credit Weaver's testimony that members of the Band are divided among three different senate districts, which will make it more difficult for the Band to influence elections in those districts. We do not credit Weaver's testimony about the Band's ability to elect its candidate of choice under any of the plans presented because he did not offer any factual basis to support his opinion that the candidate of choice for the black population would necessarily be the same candidate of choice for the Band population.

1. Testimony of Isabel Rubio

The Executive Director of the Hispanic Interest Coalition of Alabama, Isabel Rubio, testified on behalf of the Democratic Conference plaintiffs. She explained that the Coalition is a nonprofit organization founded in 1999 to facilitate the social, civic, and

economic integration of Hispanics in Alabama. (Trial Tr. vol. 4, 9-10, Aug. 13, 2013). She acknowledged that much of the Hispanic population in Alabama is made up of aliens, but she explained that some of those aliens have had children who are now old enough to vote. (Trial Tr. vol. 4, 10-11, Aug. 13, 2013). Rubio testified at length about her opinion that the Legislature has not been sensitive to the Hispanic community in the State and that, as a result, many Hispanics have left the State and others have become more politically active. (Trial Tr. vol. 4, 11-16, Aug. 13, 2013). Rubio explained that Hispanics in the United States exhibited strong support for President Obama in 2008 and 2012. (Trial Tr. vol. 4, 17, Aug. 13, 2013). And she testified that the immigration legislation in Alabama has caused the Hispanic population to work more closely with the black population in Alabama. (Trial Tr. vol. 4, 17-18, Aug. 13, 2013).

We credit much of Rubio's testimony. We credit her testimony about the Coalition and its work in Alabama. We also credit her testimony that, although a substantial number of Hispanics in Alabama are aliens, some of those noncitizens have citizen children of voting age. And we credit her testimony that the Hispanic population in Alabama has begun to work more closely with the black population and become more mobilized. But we decline to adopt, as immaterial, the opinions expressed by Rubio about the immigration policies in Alabama.

m. Testimony of Bernard Simelton

The president of the National Association for the Advancement of Colored People in Alabama, Bernard Simelton, testified on behalf of the Democratic Conference plaintiffs. (Trial Tr. vol. 2, 194, Aug. 9, 2013). He testified that the Association has been engaged in efforts to improve the relationship between the black and Hispanic communities in Alabama. (Trial Tr. vol. 2, 195, Aug. 9, 2013). He testified that the communities have become closer because of their shared disagreement with bills passed by the Republican Legislature. (Trial Tr. vol. 2, 198-99, Aug. 9, 2013). And he testified that the Association works actively with the MOWA Indians in the Baldwin and Washington County area. (Trial Tr. vol. 2, 202-03, Aug. 9, 2013). We credit Simelton's testimony about the Association's involvement with the Hispanic population and the MOWA Indians.

n. Testimony of Professor Allan J. Lichtman

Professor Allan J. Lichtman provided expert testimony that voting is racially polarized in Alabama. (Ex. NPX 324). Lichtman conducted ecological regression analysis based on county-level and precinct-level election returns to calculate how black and white persons voted in recent senatorial, presidential, and judicial elections. (Ex. NPX 324, 4). Based on this analysis, Lichtman concluded that in Alabama "African Americans invariably prefer Democratic candidates in general elections and [] whites invariably

prefer Republican candidates." (Ex. NPX 324, 4). In six general elections, Lichtman determined that the mean support of blacks for black Democrats was 94 percent and that the mean support of blacks for white Democrats was 92 percent. (Ex. NPX 324, 6-7). By contrast, the mean level of support by white voters for black Democrats was 19 percent and the mean level of support by white voters for white Democrats was 29 percent. (Ex. NPX 324, 6-7). Based on this data, Lichtman found that "polarization between African Americans and whites in general elections is greater when the Democratic candidate is African American rather than white." (Ex. NPX 324, 4). Lichtman's ecological regression analysis also suggested that 100 percent of black voters in Jefferson County, Madison County, and Montgomery County vote for Democrats, regardless of whether the candidate is black or white. (Ex. NPX 324, 13-15). Comparatively, white voters in Jefferson County had a mean level of support for black Democrats of 19 percent and a mean level of support for white Democrats of 33 percent, (Ex. NPX 324, 13); white voters in Madison County had a mean level of support for black Democrats of 24 percent and a mean level of support for white Democrats of 36 percent, (Ex. NPX 324, 14); and white voters in Montgomery County had a mean level of support for black Democrats of 20 percent and a mean level of support for white Democrats of 41 percent, (Ex. NPX 324, 15).

We credit Lichtman's testimony that most black voters in Alabama favor Democrats and that most

white voters in Alabama favor Republicans, but we do not credit Lichtman's opinion that race is the motivating factor for this voting pattern in Alabama. Lichtman did not conduct any statistical analysis to determine whether factors other than race were responsible for the voting patterns. He did not consider affluence, strength of a political campaign, or party loyalty. (Trial Tr. vol. 3, 102-05, Aug. 12, 2013). Instead, he asserted repeatedly that the resulting voter patterns were similar, which suggests that race is the motivating factor. (Trial Tr. vol. 3, 91, 101-05, Aug. 12, 2013). Lichtman also did not conduct any analysis of Democratic primaries between black and white candidates, which might have offered further evidence about whether white voters are more likely to support white Democrats and black voters are more likely to support black Democrats. (Trial Tr. vol. 3, 101-102, Aug. 12, 2013).

Lichtman also testified that the evidence suggests that Native Americans and Hispanics in Alabama are politically cohesive. (Ex. NPX 324, 17). Lichtman explained that 41 percent of the registered voters who vote at the McIntosh High School precinct in Senate District 22 are Native Americans, and 23 percent of the registered voters who vote at that precinct are black persons. (Ex. NPX 324, 17). The precinct cast 75 percent of its votes for the Democratic incumbent, W.J. Pat Lindsey, during the 2006 general election for the Legislature, and the precinct cast 87 percent of its votes for the Democratic candidate, Mark Keahey, during the 2010 general election. (Ex.

NPX 324, 17-18). Based on these numbers from a single precinct, Lichtman concluded that blacks and Native Americans ordinarily vote in coalition. (Ex. NPX 324, 17, 20). Lichtman also reasoned that, because, "with the exception of Cuban-Americans, Hispanics are overwhelmingly Democratic in their choice of candidates" and because most of the Hispanic population in Alabama is not Cuban American, the Hispanic population in Alabama must be politically cohesive. (Ex. NPX 324, 20).

We do not credit Lichtman's opinions about the political cohesiveness of Native Americans and Hispanics in Alabama. Lichtman acknowledged that "[t]here is an insufficient concentration of Native Americans or Hispanics in the state of Alabama for ecological regression analysis." (Ex. NPX 324, 17). And he relied upon data from a single precinct to speculate about the voting behavior of Native Americans and generalizations about Hispanics across the United States to speculate about Hispanic voting patterns in Alabama. (Ex. NPX 324, 17). Lichtman's conclusions about the political cohesiveness of these groups are insufficiently supported in the record.

Lichtman next testified that the illustrative districts introduced by the Democratic Conference plaintiffs would give minorities a better opportunity to elect the candidates of their choice. The Democratic Conference plaintiffs introduced an illustrative map of Montgomery County that includes an additional majority-black House district, (Ex. NPX 300); an illustrative map that preserves nine majority-black

House districts in Jefferson County, (Ex. NPX 301); and an illustrative map of a minority-opportunity Senate district in Madison County, (Ex. NPX 302). Lichtman acknowledged that he did not look at any statewide plans, (Trial Tr. vol. 2, 97, Aug. 12, 2013), but testified that the data from previous elections suggests that these districts would provide minority voters a very good opportunity to elect candidates of their choice, (Trial Tr. vol. 3, 97-98, Aug. 12, 2013). We credit Lichtman's testimony about these illustrative districts.

o. Testimony of William S. Cooper

William S. Cooper provided expert testimony about alternative redistricting plans for the Black Caucus plaintiffs. Cooper testified that he has been preparing redistricting plans for approximately 25 years and has worked with Maptitude since the late 1980s. (Ex. APX 69, 2). Cooper drew the redistricting maps, HB16 and SB5, introduced by Democratic members of the Legislature as alternatives to the plans adopted by the Committee. (Ex. APX 69, 2). He used the data produced by the 2010 Census; the block equivalency files from the Alabama Reapportionment Office, which were linked to the versions of the plans produced by the Committee; and lists of some of the addresses of the incumbents. (Ex. APX 1, 2-4). When counsel for the Black Caucus plaintiffs hired Cooper to draft alternative plans, counsel instructed Cooper to preserve the same number of majority-black districts and to avoid county splits to the extent possible,

particularly within the Black Belt. (Ex. APX 1, 3). Cooper testified that he drew the plan without any knowledge of Alabama politics, geography, or the locations of incumbents, and that he spent only 40 hours on the project. And he explained that he intended the plans that became HB16 and SB5 to serve as initial drafts that he would alter based on input from legislators, (Ex. APX 1, 4), but the schedule of the Legislature did not permit any changes to the plans before the Democratic legislators introduced them. (Trial Tr. vol. 2, 110, Aug. 12, 2013).

Cooper acknowledged that the Legislature needed to make significant changes to the district lines because of the severe malapportionment of the existing districts, (Trial Tr. vol. 2, 90, Aug. 9, 2013), but he explained that the Legislature could have split fewer counties and precincts if the Committee had followed an overall deviation in population of 10 percent, (Trial Tr. vol. 2, 69, Aug. 9, 2013). Cooper testified that HB16 and SB5, which follow an overall deviation of 10 percent, split fewer counties and precincts than the Acts. (Trial Tr. vol. 2, 69, Aug. 9, 2013); *see also* (Ex. APX 25; Ex. APX 26). Cooper explained that traditional redistricting principles protect the integrity of precincts, but he admitted that the districts adopted in 2001 had a similar number of precinct splits as the Acts. (Trial Tr. vol. 2, 107, Aug. 9, 2013).

Cooper also testified that, in his opinion, the Acts pack the majority-black districts. (Trial Tr. vol. 2, 82-83, Aug. 9, 2013). He testified that the margins between the white population and the black population

in those districts are much larger in Act 602 than in the HB16 plan, which he referred to as "smoking gun evidence that shows that there's been some packing in the Act 602 house plan." (Trial Tr. vol. 2, 82, Aug. 9, 2013). He also explained that the margins were smaller for the Senate districts, but that the margins again suggest packing. (Trial Tr. vol. 2, 83, Aug. 9, 2013). But he acknowledged that most of the majority-black districts in his plans were underpopulated by more than an overall deviation in population of 2 percent and that his plan for the House did not increase the total black population in District 84 to create a new majority-black district. (Trial Tr. vol. 2, 83-84, Aug. 9, 2013).

We credit much of Cooper's testimony. We credit Cooper's testimony that the Legislature could have split fewer county and precinct lines if it had adopted a higher overall deviation in population. And we credit Cooper's testimony that his plans lowered the margins between the black and white populations in majority-black districts. But we do not credit Cooper's testimony that the Acts packed the majority-black districts based solely on data that compares the Acts to Cooper's plans without any consideration of the previous plans and the Committee's asserted goals to maintain a lower overall deviation in population equality and to avoid retrogression in those districts.

p. Testimony of Theodore S. Arrington

Theodore S. Arrington provided expert testimony on behalf of the Democratic Conference plaintiffs

that the majority-black districts were packed to isolate and diminish the strength of black voters. Arrington testified that the 1993 and 2001 redistricting plans drawn by Democratic legislators constituted a "dummymander" because they packed majority-black districts in a manner intended to help the Democratic Party, but the plans in fact hurt the Party. (Trial Tr. vol. 3, 49-50, Aug. 12, 2013). He testified that a 51 percent voting-age population is enough to give minority voters the opportunity to elect the candidate of their choice anywhere in the State, and he suggested that, "[c]ertainly, 54-56% concentration is enough everywhere." (Ex. NPX 323, 15, 17). He explained that, although experts used to think that a minority presence of 65 percent was necessary to ensure that the minority group would be able to elect the candidate of its choice, the increased registration and mobilization of black voters has reduced that number. (Ex. NPX 323, 19). Arrington speculated that black leaders may have agreed to have their districts "packed" in the last round of redistricting because of uncertainty over the percentage of black voters required to have an opportunity to elect their candidate of choice and because black officials had a strong voice in the governing coalition. (Ex. NPX 323, 22).

We do not credit Arrington's opinion that the districts in the new plan are packed. Arrington admitted on cross-examination that, in 2000, he testified that a district in which black persons made up a voting-age population of 61 percent would offer only an opportunity for black voters to elect the candidate

of their choice, not a guarantee that black voters would be able to elect the candidate of their choice. (Trial Tr. vol. 3, 80-81, Aug. 12, 2013). And he had also testified in 2000, contrary to his testimony on direct examination in this matter, that no clear minimum could be set to determine across jurisdictions what voting-age population is necessary to give a minority group the opportunity to elect its candidate of choice. (Trial Tr. vol. 3, 78, Aug. 12, 2013). Arrington conceded that, if the Legislature had intended to pack black voters, the Legislature could have overpopulated all of the majority-black districts and that the new plans did not systematically overpopulate those districts. (Trial Tr. vol. 3, 62-63, Aug. 12, 2013).

Arrington also testified that, in his view, the districts were enacted for a discriminatory purpose. In his expert report, Arrington asserted that "[t]he purpose of the enacted plans is to perpetuate or create a kind of 'political apartheid' such as the Supreme Court rejected in *Shaw v. Reno* (509 U.S. 630 [1993]) and its progeny." (Ex. NPX 323, 10). He reasoned, "Since the face of the Alabama Republican Party is white (e.g., all the G.O.P. legislators are white), the Republican super-majority in the legislature designed the districts to create a situation where the Democratic Party in the legislature would be all black." (Ex. NPX 323, 11). As further support for the existence of this strategy, Arrington cited as evidence the affidavits of several white Democratic legislators who have been asked by Republicans to switch parties and the affidavits of several black Democratic legislators who have never been asked. (Ex. NPX 323, 11-12).

Arrington also testified that, because the splitting of precincts bears more heavily on minority voters, the high number of precinct splits in the Acts is evidence of discriminatory purpose. (Ex. NPX 323, 36-38). And Arrington suggested that the departure from normal procedures in the passage of the legislation in a special session evidenced discriminatory intent, as did the greater access of Republican legislators to see and make changes to the plans because Democrats had only the illusion of participation in the process. (Ex. NPX 323, 54-59).

We do not credit Arrington's opinion that the districts were enacted for an invidious discriminatory purpose. On cross-examination, Arrington retreated from many of the points he made in his report. For example, he admitted on cross-examination that a party in power typically develops its plan by itself and that process is not, standing alone, evidence of an intent to discriminate on the basis of race. (Trial Tr. vol. 3, 71, Aug. 12, 2013). Arrington also admitted that he was unaware that the Alabama Legislature had never redistricted itself during the first regular session after the census, which undermined his opinion that the Legislature had deviated from normal procedures when it enacted the redistricting plans. (Trial Tr. vol. 3, 73, Aug. 12, 2013).

5. Evidence Presented by the State Defendants at Trial

The State defendants introduced the testimony of four witnesses to rebut the evidence introduced

by the plaintiffs. Senator Dial and Representative McClendon testified at length about the goals of the Reapportionment Committee, the development of the plans, and the input they received from legislators. Randy Hinaman testified about his work on the plans. And Thomas L. Brunell testified as an expert on behalf of the State defendants.

a. Testimony of Senator Gerald Dial

Senator Dial testified on behalf of the State defendants that the Committee had six primary goals. First, the Committee wanted to comply with the requirement of one person, one vote by making the districts as equally populated as possible. (Trial Tr. vol. 1, 27, Aug. 8, 2013; Ex. CE 27). Second, the Committee wanted to avoid future litigation about compliance with the requirement of one person, one vote. (Trial Tr. vol. 1, 27, Aug. 8, 2013; Ex. CE 27). Third, the Committee wanted to comply with the Voting Rights Act. (Trial Tr. vol. 1, 27-28, Aug. 8, 2013; Ex. CE 27). Fourth, the Committee wanted to comply with section 5 of the Voting Rights Act, which it understood to require that it not reduce the number of majority-black districts or the approximate levels of black population within those districts. (Trial Tr. vol. 1, 28, Aug. 8, 2013; Ex. CE 27). Fifth, the Committee wanted to draw districts to avoid incumbent conflicts. (Trial Tr. vol. 1, 28, Aug. 8, 2013; Ex. CE 27). Sixth, the Committee wanted to preserve communities of interest when possible. (Trial Tr. vol. 1, 28, Aug. 8, 2013; Ex. CE 27). With the exception of the

decision to adopt an overall deviation in population of 2 percent, the guidelines adopted by the Committee were the same guidelines that had been used in 2001. (Trial Tr. vol. 1, 27, 29, Aug. 8, 2013). And he testified that the Committee adopted the overall deviation of 2 percent before Hinaman became involved in the process. (Trial Tr. vol. 1, 138, Aug. 8, 2013).

Senator Dial testified that the Committee held public hearings to obtain input from the public about how to draw the districts. (Trial Tr. vol. 1, 30, Aug. 8, 2013). The Committee held those hearings in 21 locations throughout Alabama before the Committee produced any new plans, and the Committee advertised the hearings through various forms of media. (Trial Tr. vol. 1, 27-32, Aug. 8, 2013; Ex. CE 2). At those hearings, members of the public asked the Committee not to split their counties, and Senator Dial relayed that information to Hinaman. (Trial Tr. vol. 1, 91, Aug. 8, 2013). Senator Dial thought that the process was fairer than the process used in the past because the Committee sought comments from the public before it produced the plans, instead of afterward. (Trial Tr. vol. 1, 25-26, 30-32, Aug. 8, 2013). But he also knew that it would be unable to accommodate all of the requests of the public if the legislators were to comply with federal law. (Trial Tr. vol. 1, 68-69, Aug. 8, 2013).

Senator Dial also testified that he consulted each of his 34 colleagues in the Senate about their preferences for their districts. (Trial Tr. vol. 1, 34, Aug. 8, 2013). He showed each senator the statistics for his or

her district to explain how many people the district needed to gain or lose to fall within the guideline for population deviation. (Trial Tr. vol. 1, 34-35, Aug. 8, 2013). And he asked each senator about his or her preferences on population to gain or lose. (Trial Tr. vol. 1, 34-35, Aug. 8, 2013). He promised each senator that he would not draw districts with incumbent conflicts, but he could not accommodate all of the requests from his colleagues. (Trial Tr. vol. 1, 36, Aug. 8, 2013).

Senator Dial explained that the systematic underpopulation of the majority-black districts required significant changes to the district lines in the Senate, but that he incorporated input from the legislators who represented those districts as he enlarged those districts. (Trial Tr. vol. 1, 37-38, 48, Aug. 8, 2013). He often refereed disputes among senators to try to accommodate particular requests. (Trial Tr. vol. 1, 119, Aug. 8, 2013). And he specifically incorporated ideas from black legislators. (Trial Tr. vol. 1, 37-38, Aug. 8, 2013).

In Jefferson County, all three majority-black districts needed to gain population, and Senator Smitherman, a Democrat who represented one of those districts, supplied Senator Dial with a map of proposed districts. (Trial Tr. vol. 1, 40-41, Aug. 8, 2013). Under that plan, Districts 18, 19, and 20 would gain population to fall within the overall deviation of 2 percent and would remain entirely within Jefferson County. (Ex. SDX 469). Dial adopted about 99 percent of that plan. (Trial Tr. vol. 1, 96, Aug. 8,

2013). And Dial divided the rest of the population of Jefferson County among five majority-white districts that extend outside of the County boundaries. (Trial Tr. vol. 1, 70-71, Aug. 8, 2013). Although Dial could have used white population within Jefferson County to repopulate the majority-black districts, he was concerned that doing so would have resulted in the retrogression of the majority-black districts and potentially created a problem for preclearance. (Trial Tr. vol. 1, 66, 69, Aug. 8, 2013).

In Mobile County, Senator Dial sought input from Senator Figures, who represented a majority-black district in Mobile that needed to gain population. (Trial Tr. vol. 1, 40, Aug. 8, 2013). Neither Senator Figures, nor any of the other senators from Mobile County, wanted another senator to join the Mobile County delegation, and the new plan accomplished that goal by changing the shape of District 22 to absorb much of the overpopulation from District 32 across the Mobile Bay in Baldwin County. (Trial Tr. vol. 1, 40-41, 45, Aug. 8, 2013; Ex. APX 49). Senator Sanders, who represented District 23, which bordered District 22 to the north, wanted to gain minority members from District 22 and give up population in Autauga County. (Trial Tr. vol. 1, 36-38, Aug. 8, 2013). Senator Dial partially accommodated those requests by removing District 23 from Autauga County and extending the district partially into District 22. (Trial Tr. vol. 1, 38, Aug. 8, 2013; Ex. APX 49).

Senator Dial also testified that the need to "grow" the majority-black districts in the Black Belt had a

domino effect on the districts along the western edge of Alabama. (Trial Tr. vol. 1, 35-36, Aug. 8, 2013). District 24 moved north, District 21 moved north, District 6 moved north, and District 1 moved west to accommodate some of the overpopulation in the former District 2. (Ex. APX 17; Ex. APX 49; Ex. APX 50). Senator Dial met with the senator from District 1, Senator Tammy Irons (D), about the proposed changes to her district and accommodated some of her requests, but was unable to accommodate further requests because he had no time to introduce an amendment during the consideration of the Senate plan by the Legislature. (Trial Tr. vol. 1, 46-47, Aug. 8, 2013).

Senator Dial explained that the plans were introduced, considered, and approved in a special session of the Legislature. He explained that the plans went through the same process of committee hearings and consideration and debate on the floor that any other piece of legislation would undergo in the Alabama Legislature. (Trial Tr. vol. 1, 51, Aug. 8, 2013). He testified that a special session allows for greater opportunity to engage in debate and consideration because the Legislature considers no other bills during that time. (Trial Tr. vol. 1, 51-52, Aug. 8, 2013). He also testified that the Legislature in 2001 had also adopted its redistricting plans during a special session. (Trial Tr. vol. 1, 136-37, Aug. 8, 2013). He testified that the first time he saw the alternative plans introduced at the special session, including the Sanders plan and the Reed-Buskey plan, was in committee

or on the Senate floor and that none of the Senators who developed those plans ever consulted him or other Republican legislators about those plans. (Trial Tr. vol. 1, 141-42, Aug. 8, 2013).

Senator Dial testified that he had no goal or intent to discriminate against the black population in Alabama during the redistricting. (Trial Tr. vol. 1, 143-44, Aug. 8, 2013). He testified that no member of the Senate who represented a majority-black district had ever asked for a district with a black population of only 55 percent, and Senator Hank Sanders (D) told Senator Dial that he thought that all of the majority-black districts should have a black population of at least 62 percent. (Trial Tr. vol. 1, 36-37, Aug. 8, 2013). Senator Dial testified that, if he had suggested to the senators who represented the majority-black districts that new districts with black populations of only 55 percent would be better for the black population in Alabama, those senators would not have responded favorably to his suggestion that he knew better than they did. (Trial Tr. vol. 1, 43-44, Aug. 8, 2013). A former Democrat turned Republican, Senator Dial testified that he had no contact with the Republican National Committee during the reapportionment process, was not aware of any national strategy to make the Republican Party the "white party" and the Democratic Party the "black party," and had no private conversations about that alleged strategy. (Trial Tr. vol. 1, 59-60, Aug. 8, 2013). And he testified that, although the new districts the Legislature adopted were not perfect or the only way to draw

the districts, they met the goals of the Committee to maintain the number of majority-black districts, to maintain the approximate percentages of the black population in those districts, to avoid incumbent conflicts, and to draw districts of approximately equal size. (Trial Tr. vol. 1, 143-44, Aug. 8, 2013).

b. Testimony of Representative Jim McClendon

Representative McClendon testified consistently with Senator Dial about the adoption by the Committee of the guidelines. He explained that an overall deviation of 2 percent just "ma[de] good sense" to him because it makes the districts more equal. (Trial Tr. vol. 3, 220, Aug. 12, 2013). He also testified that his impression was that the Department of Justice did not have a specific baseline for retrogression, but that it looked at relative numbers, so the Committee tried to match the percentages of the total black population in majority-black districts to the percentages in the 2001 districts based on the 2010 Census numbers. (Trial Tr. vol. 3, 221, Aug. 12, 2013).

Representative McClendon testified that he tried to accommodate requests from his colleagues, Democratic and Republican, in the plan for the House of Representatives. (Trial Tr. vol. 3, 222, Aug. 12, 2013). Representative McClendon testified that he offered to meet with all of the members of the House of Representatives to discuss their new districts, but that not every member of the House accepted that offer. (Trial

Tr. vol. 3, 222-23, Aug. 12, 2013). Representative Thad McClammy (D) arranged a meeting with McClendon and, during that meeting, provided McClendon a proposed plan for the majority-black districts in Montgomery to which the other legislators had agreed. (Trial Tr. vol. 3, 228-29, Aug. 12, 2013). McClendon passed that map along to Hinaman, with the instructions to incorporate that plan if possible. (Trial Tr. vol. 3, 228-29, Aug. 12, 2013). And when Representative Harper asked to gain 12 people from Greene County and the neighboring representative agreed, he incorporated that change into the plan. (Trial Tr. vol. 3, 229-30, Aug. 12, 2013).

Representative McClendon admitted that redistricting is a political process, but denied having any racially discriminatory motive in his development of the redistricting plans. (Trial Tr. vol. 3, 234, Aug. 12, 2013). McClendon acknowledged making several statements that, under the new plans, the number of Republicans in the Alabama House would likely increase from 66 representatives to 68 to 70 representatives and that the number of Republicans in the Senate would increase from 22 senators to 23 to 25. (Trial Tr. vol. 3, 240, Aug. 12, 2013; Ex. APX 58). McClendon also admitted that, although he met with any member of the House who wanted to meet with him, only Republicans were given the opportunity to meet with Hinaman to work on their districts. (Trial Tr. vol. 3, 246, Aug. 12, 2013). But he denied any intent to eliminate white Democratic members from the Legislature. (Trial Tr. vol. 3, 240, Aug. 12, 2013).

He testified that he had no racially discriminatory motive when he agreed to the adoption of an overall deviation of 2 percent. (Trial Tr. vol. 3, 234, Aug. 12, 2013). And he testified that he had no racially discriminatory motive when he worked with Hinaman and the members of the Alabama House of Representatives to draft the new districts. (Trial Tr. vol. 3, 234, Aug. 12, 2013).

c. Testimony of Randolph L. Hinaman

Randolph L. Hinaman also testified on behalf of the State defendants. Hinaman is a political consultant who works primarily for members of the Republican Party and who has been involved in Alabama politics since the mid-1980s, when he served as the campaign manager and then the chief of staff for Congressman Sonny Callahan (R-AL-01). (Ex. NPX 352). In 2011 and 2012, he worked on the redistricting plans for the Alabama congressional delegation, which included six Republicans and one Democrat, and he drew plans for that delegation with zero deviation in population equality. (Trial Tr. vol. 3, 116, Aug. 12, 2013; Ex. NPX 352). Citizens for Fair Representation, Inc., a 501(c)(4) nonprofit organization located in Alabama, hired Hinaman to redraw the districts for the Alabama Legislature too. (Ex. NPX 352). In accordance with his contract, Hinaman met with the Republican leadership to determine the goals of the redistricting, and those leaders instructed him to use an overall deviation in population of 2 percent, to preserve the majority-black districts without

retrogression, to avoid incumbent conflicts if at all possible, and to comply with the other instructions included in the guidelines approved by the Reapportionment Committee. (Trial Tr. vol. 3, 117-18, Aug. 12, 2013).

Hinaman explained that the effort to preserve the majority-black districts and bring them into compliance with the requirement of one person, one vote drove the development of the Acts. All of the majority-black districts were underpopulated, many significantly, and he needed to add population from contiguous districts to increase the total population of the districts without significantly lowering the percentage of the population in each district that was majority-black. (Trial Tr. vol. 3, 122-23, Aug. 12, 2013). He explained that the underpopulation of the majority-black districts in the Black Belt caused Senate Districts 21 and 6 to move north; Senate Districts 4, 5, and 1 to move east; and Senate District 22 to move south. (Trial Tr. vol. 3, 122-24, Aug. 12, 2013). He also explained that the underpopulation in Senate District 33 in Mobile County caused Senate District 34 to move and Senate District 22 to gain population from the overpopulated areas of Baldwin County. (Trial Tr. vol. 3, 130-31, Aug. 12, 2013). And Hinaman explained that the majority-black House districts in Jefferson County were around 70,000 people short of the ideal population and any attempt to repopulate all nine of the majority-black districts with the population in Jefferson County would cause retrogression to the point that the plan might not be precleared.

(Trial Tr. vol. 3, 132-33, Aug. 12, 2013). For that reason, Hinaman moved House District 53 to the Huntsville area, where he was able to create another majority-black House district. (Trial Tr. vol. 3, 131-32, Aug. 12, 2013). When necessary to avoid retrogression, Hinaman split precincts at the census block level. (Trial Tr. vol. 3, 143, Aug. 12, 2013).

Hinaman testified that "no one gets everything they want in redistricting," but he tried to accommodate the wishes of legislators where possible. (Trial Tr. vol. 3, 137, Aug. 12, 2013). He traveled to Alabama to meet with Republican legislators every couple of weeks during the regular session of the Legislature. (Trial Tr. vol. 3, 119-20, Aug. 12, 2013). Where the Republican legislators agreed upon boundaries and those particular boundaries did not pose a problem for either the requirement of one person, one vote or for the preservation of the majority-black districts, he accommodated those requests. (Trial Tr. vol. 3, 120-21, Aug. 12, 2013). Hinaman also accommodated the suggestions from Democratic legislators that he received from Senator Dial and Representative McClendon. (Trial Tr. vol. 3, 120, Aug. 12, 2013). Hinaman incorporated almost in its entirety a map of the majority-black districts in Jefferson County drawn by one of the representatives for those districts. (Trial Tr. vol. 3, 120, Aug. 12, 2013). And Hinaman partially incorporated a map of the majority-black districts in Montgomery County produced by one of the representatives for those districts. (Trial Tr. vol. 3, 121, Aug. 12, 2013). Hinaman also spoke

with several Democratic members of the Legislature during the final week before the passage of the bill and accommodated requests from those legislators when all of the legislators affected by the requests agreed. (Trial Tr. vol. 3, 135-36, Aug. 12, 2013).

Hinaman denied that he had any invidious purpose to discriminate against blacks when he drew the new districts. When asked on cross-examination about particular changes he could have made to the map, he responded that "you can pull out any district and draw it without taking regard to all the things that are around it[,] [b]ut unfortunately the whole map has to fit together." (Trial Tr. vol. 3, 160, Aug. 12, 2013). He explained, for example, that a map that draws an additional majority-black district in Montgomery County, like the Democratic Conference plaintiffs' illustrative map, does not account for the need to bring District 69, another majority-black district, into Montgomery County. (Trial Tr. vol. 3, 159-61, Aug. 12, 2013). Hinaman also testified that he tried to draw another majority-black Senate district in Madison County, but that he could not draw such a district within deviation. (Trial Tr. vol. 3, 187, Aug. 12, 2013).

We credit the consistent testimony of Senator Dial, Representative McClendon, and Hinaman about the Committee's goals and the creation of the new districts. And we credit the consistent and unequivocal testimony of Senator Dial, Representative McClendon, and Hinaman that none of them acted with a racially discriminatory purpose or motive during the redistricting process.

d. Testimony of Thomas L. Brunell

The State defendants introduced the expert testimony of Thomas L. Brunell to refute the expert testimony offered by the plaintiffs. Brunell testified that the adoption of the overall deviation in population of 2 percent is consistent with the decisions of other states around the country after *Larios* and benefits all citizens in Alabama. (Trial Tr. vol. 3, 197-201, Aug. 12, 2013; Ex. SDX 458). He explained that, although the Acts created many safe Republican seats, the overall deviation of 2 percent prevented the Legislature from creating a severe partisan gerrymander. (Trial Tr. vol. 3, 198-99, Aug. 12, 2013). He testified that the statistics from other states confirm that lower population deviations are less closely aligned with partisanship. (Trial Tr. vol. 3, 205, Aug. 12, 2013). And he explained that a lower population deviation is inherently more equal than a higher population deviation and that equality was the driving force behind the redistricting revolution. (Trial Tr. vol. 3, 197-98, Aug. 12, 2013).

Brunell also testified that Arrington and Lichtman drew improper inferences about the voting behavior of the black population in Alabama when those experts opined that the districts were packed. Brunell explained that Arrington relied on the voting behavior in House District 85 to extrapolate about behavior across the State, but that voting behavior is affected by a number of factors that will vary across the State, including the proportion of black and white voting-age population, the degree of cohesiveness among

black and white voters, and the typical proportion of turnout. (Ex. SDX 456, 4-5). He testified that none of the experts in this matter has offered any empirical evidence to substantiate the opinion that a district with a voting-age population that is 51 percent black will provide black voters the opportunity to elect the candidate of their choice. (Ex. SDX 456. 4-5).

And Brunell testified, contrary to Cooper and Arrington, that the bimodal distribution of white and black populations in districts is neither bad policy nor illegal. As he explained, elected officials who represent highly competitive districts will find it more difficult to represent their districts because the voters of those districts will be so closely divided on controversial issues. (Trial Tr. vol. 3, 206, Aug. 12, 2013). If 50 percent of the voters in a district support a higher minimum wage and 50 percent want to abolish the minimum wage, the representative will have represented only half of the voters in the district no matter which policy option the representative favors. (Trial Tr. vol. 3, 206, Aug. 12, 2013).

We credit Brunell's testimony that lower population deviations constrain the partisan desires of Legislatures, that the record evidence is insufficient to support any conclusion about the minimum level of the black voting-age population necessary to allow the black population to elect its candidate of choice, and that representation of competitive districts is more difficult than representation of a politically cohesive district.

II. CONCLUSIONS OF LAW

We divide our discussion in two parts. First, we consider the claims of vote dilution made by the Black Caucus and Democratic Conference plaintiffs. Second, we consider the claims based on intentional discrimination made by the Black Caucus and Democratic Conference plaintiffs.

A. Vote Dilution

"A plaintiff claiming vote dilution under § 2 must initially establish that: (i) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (ii) the group is politically cohesive; and (iii) the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479, 117 S. Ct. 1491, 1498 (1997) (internal quotation marks omitted); *see Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-67 (1986). The Supreme Court first established these conditions in *Gingles*, when it interpreted for the first time the 1982 revisions to section 2 of the Voting Rights Act. *See Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67. "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647,

2655 (1994). When no showing of intentional discrimination has been made, "a sufficiently large minority population" means greater than 50 percent of the voting-age population. *Bartlett v. Strickland,* 556 U.S. 1, 15, 18-19, 129 S. Ct. 1231, 1244-46 (2009) (plurality opinion). And the first *Gingles* condition should not be read to define dilution as a failure to maximize. *De Grandy,* 512 U.S. at 1016, 114 S. Ct. at 2659; *see also id.* at 1017, 114 S. Ct. at 2660 ("One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of § 2.").

The Supreme Court has never explicitly recognized the ability of a minority voter to state a claim for vote dilution in violation of section 2 of the Voting Rights Act based on evidence of a coalition of two different minority groups, *see Strickland,* 556 U.S. at 13-14, 129 S. Ct. at 1242-43, but the Eleventh Circuit has held that "[t]wo minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner." *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs,* 906 F.2d 524, 526 (11th Cir. 1990). Although other circuits have disagreed with that decision, *see, e.g., Hall v. Virginia,* 385 F.3d 421, 431 (4th Cir. 2004) ("A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result

in vote dilution 'on account of race' in violation of Section 2."); *Frank v. Forest Cnty.*, 336 F.3d 570, 575 (7th Cir. 2003) (describing as "problematic" the argument that a voter can state a claim for vote dilution based on a coalition of two minority groups); *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1387 (6th Cir. 1996) ("A textual analysis of § 2 reveals no word or phrase which reasonably supports combining separately protected minorities."), we are bound by it, *see Ala. NAACP State Conf. of Branches v. Wallace*, 269 F. Supp. 346, 350 (M.D. Ala. 1967) (three-judge court). A plaintiff who proves that two minority groups are politically cohesive may satisfy the first *Gingles* factor if a reasonably compact district could be formed in which those two minority groups make up a majority of the voting-age population.

After the plaintiff has established the three *Gingles* elements, the plaintiff must also establish that the totality of the circumstances supports a finding that the voting scheme is dilutive. *Bossier Parish*, 520 U.S. at 479, 117 S. Ct. at 1498. Relevant factors to this analysis include (1) the history of voting-related discrimination in the State; (2) the extent to which voting is racially polarized in the State; (3) the extent to which the State has used voting practices that tend to enhance the opportunity of discrimination against the minority group; (4) if there is a candidate slating process, the extent to which members of the minority group have been denied access to that process; (5) the extent to which members of the minority "bear the effects of discrimination in

such areas as education, employment and health, which hinder their ability to participate effectively in the political process"; (6) the extent to which political campaigns have included overt or subtle racial appeals; and (7) the extent to which members of the minority have been elected to public office. *See Gingles,* 478 U.S. at 36-37, 106 S. Ct. at 2759. Proportionality of majority-minority districts at the statewide level is a relevant fact in the totality of the circumstances. *See League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 437, 126 S. Ct. 2594, 2620 (2006). And, in some cases, a "significant lack of responsiveness" by elected officials to the needs of a minority group or a tenuous policy underlying the voting procedure adopted might also be probative of vote dilution. *See Gingles,* 478 U.S. at 37, 106 S. Ct. at 2759. But the "defendant in a vote dilution case may always attempt to rebut the plaintiff's claim by introducing evidence of objective, non-racial factors under the totality of the circumstances standard." *Nipper v. Smith,* 39 F.3d 1494, 1513 (11th Cir. 1994).

1. The Black Caucus Plaintiffs Failed To Prove the First *Gingles* Requirement for All of Their Claims.

The Black Caucus plaintiffs raise three different theories of vote dilution, but they failed to prove the first *Gingles* condition for all three theories. The Black Caucus plaintiffs argue that the Acts dilute the voting strength of blacks across the State, but they failed to prove that an additional majority-black

district could be created anywhere in the State. The Black Caucus plaintiffs argue that the Acts dilute the voting strength of blacks in Madison County, but they failed to prove that the Legislature could have created a coalitional district in Senate District 7 in which the coalition made up a simple majority of the district. And the Black Caucus plaintiffs argue that the Acts dilute the voting strength of blacks in Jefferson County because they shift the balance between majority-white and majority-black House districts, but they failed to introduce a plan that draws another majority-black district in Jefferson County within the allowable population deviation. (Doc. 174: Mem. Op. & Order).

First, the Black Caucus plaintiffs argued that the Acts dilute the voting strength of blacks across the State, but they failed to prove that the Legislature could have created an additional reasonably compact district with a black voting-age population of greater than 50 percent anywhere in the State. *See Johnson v. De Grandy,* 512 U.S. 997, 1008, 114 S. Ct. 2647, 2655 (1994); *see also Bartlett v. Strickland,* 556 U.S. 1, 18-19, 129 S. Ct. 1231, 1245 (2009) (plurality opinion). The Black Caucus plaintiffs introduced HB16 and SB5 as evidence, but those plans do not create any additional majority-black districts. Instead, those plans actually create fewer opportunities for black voters to elect the candidates of their choice than does Act 602. Act 602 preserved the same 27 majority-black districts from the 2001 plan and increased the black percentage in District 85 to make it

a majority-black district in total population, though only a plurality district in voting-age population. HB16 also increased the voting-age black population in District 85 to make it a majority-black district, but did so at the cost of a formerly majority-black district. Under that plan, District 84, which was a majority-black district under the 2001 plan, would have a voting-age population that is only 24.73 percent black. Because the Black Caucus plaintiffs have failed to prove that the Legislature could have created an additional majority-black district and because the only plan they offered actually creates fewer opportunities for black voters in Alabama to elect their candidates of choice, the Black Caucus plaintiffs have failed to satisfy their burden.

And even if the plans offered by the Black Caucus plaintiffs contained an additional majority-black district, we would conclude that the Black Caucus plaintiffs failed to satisfy the first *Gingles* requirement because the plans do not comply with the guideline of an overall deviation in population of 2 percent. The Committee adopted a guideline that required the redistricting plans to comply with an overall deviation of 2 percent, and the Committee was entitled to adopt that guideline. Section 2 of the Voting Rights Act concerns political processes that "are not equally open to participation by [minority groups] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Nothing in section 2 of the Voting

Rights Act would require the State to adopt a higher population deviation and a less equal system for the election of its representatives to give minorities a better opportunity than other members of the electorate to participate in the political process. Stated differently, minority voters are not entitled to greater voting power than non-minority voters. The Black Caucus plaintiffs cannot satisfy the first *Gingles* requirement with an illustrative plan that fails to meet the guideline of an overall deviation of 2 percent.

Second, the Black Caucus plaintiffs argued that Act 603 diluted the voting strength of black and Hispanic voters in Senate District 7, but they again failed to prove that the Legislature could have created a majority-minority district in that area. Under SB5, Senate District 7 would have a voting-age population that is 40.10 percent black and 5.46 percent Hispanic. (Ex. APX 23). The Black Caucus plaintiffs presented some testimony that the Hispanic voters in Senate District 7 are politically cohesive with black voters, but we need not decide whether they have met their burden on that point. Even if the black and Hispanic voters in Senate District 7 are politically cohesive, the minority groups do not make up a simple majority of the voting-age population in the district drawn in SB5. *See Strickland*, 556 U.S. at 15, 129 S. Ct. at 1243. Because the Black Caucus plaintiffs have not proved that any coalition of black and Hispanic voters in Madison County is sufficiently large and geographically compact to make up a simple majority of Senate District 7, the Black Caucus

plaintiffs cannot establish the first *Gingles* requirement. *See id.* And, in the alternative, we conclude that the Black Caucus plaintiffs failed to meet their burden to establish the first *Gingles* requirement because their plan for Senate District 7, like their plan for the State as a whole, follows an overall deviation in population of 10 percent.

Third, the Black Caucus plaintiffs argue that Act 602 dilutes the votes of black voters in Jefferson County because the Act moved one of the majority-black House districts out of Jefferson County, but the Black Caucus plaintiffs have not produced a plan that would draw an additional majority-black district in Jefferson County without eliminating a majority-black district in another part of the State and would comply with the allowable overall deviation of 2 percent. HB16 draws nine majority-black districts in Jefferson County, (Ex. APX 11), but it follows an overall deviation of 10 percent. For the reasons already explained, the State was entitled to try to comply with the requirement of one person, one vote by setting an overall deviation in population of 2 percent. And the Black Caucus plaintiffs cannot prove vote dilution with illustrative maps that do not meet this requirement.

The Black Caucus plaintiffs also argue that the new Acts dilute the voting strength of black voters in Jefferson County because of the change in the balance of the local House delegation, but that claim is not justiciable for the reasons stated in our previous order, (Doc. 174: Mem. Op. & Order), and even if it

were, the claim would fail on the merits. Any system of local delegations for the next Legislature has not been adopted and will not be adopted until the organizational session conducted by the newly elected members in January 2015. Because we cannot know if a system of local delegations will be adopted by the next Legislature or how it will be structured, the claim is not ripe for review and the Black Caucus plaintiffs lack standing to raise it. But, even if we could consider the claim, it would fail on the merits because the Black Caucus plaintiffs failed to prove that a plan could be drawn within the overall deviation in population of 2 percent that would contain the balance they seek.

2. The Democratic Conference Plaintiffs Also Failed To Prove the First *Gingles* Requirement for All of Their Claims.

The Democratic Conference plaintiffs also raised three claims of vote dilution, each of which fails on the first *Gingles* requirement. The Democratic Conference plaintiffs argued that Act 602 dilutes the strength of black voters in Jefferson County, but failed to provide an illustrative statewide plan that includes an additional majority-black House district in Jefferson County. The Democratic Conference plaintiffs argued that Act 602 dilutes the strength of black voters in Montgomery County, but they failed to provide an illustrative statewide plan that includes an additional majority-black district in Montgomery County. And the Democratic Conference plaintiffs

argued that Act 603 dilutes the strength of minority voters in Madison County, but they failed to provide an illustrative map for a majority-minority coalitional district in Senate District 7.

First, the Democratic Conference plaintiffs argued that Act 602 dilutes the voting strength of black voters because it fails to create a minority opportunity House district in Jefferson County, but they failed to prove that the Legislature could have created an additional majority-black district in Jefferson County. The Democratic Conference plaintiffs submitted an illustrative map that divides Jefferson County into 15 House districts, nine of which are majority-black districts. But the illustrative map cannot satisfy the first *Gingles* requirement because it does not fit within a statewide plan as a whole. Act 602 includes several House districts that cross into Jefferson County, and a new plan for Jefferson County cannot be simply inserted into the state plan. As Hinaman repeatedly explained, one can always redraw lines in a particular county, but the key is to fit the illustrative map into a statewide plan. The illustrative map also underpopulates each majority-black district by almost 5 percent. (Ex. NPX 301). As we explained, the State was entitled to choose a lower population deviation, and the plaintiffs cannot establish a results claim under section 2 when the black population of Jefferson County is not sufficiently large and compact to create an additional majority-minority district within that deviation.

The Democratic Conference plaintiffs also argued that Act 602 dilutes the voting strength of blacks because it fails to create an additional majority-black House district in Montgomery County, but the Democratic Conference plaintiffs have again failed to prove the first *Gingles* requirement. The Democratic Conference plaintiffs introduced an illustrative map that divides all of Montgomery County into five House districts. Four of those districts are majority-black districts. And, unlike the Democratic Conference plaintiffs' illustrative map for Jefferson County, the illustrative map for Montgomery County complies with the overall deviation of 2 percent. But, again, the illustrative map is not drawn in the context of a statewide plan. Act 602 brought an additional majority-black House district, District 69, into Montgomery County. The Democratic Conference plaintiffs' illustrative map does not account for the domino effect that its plan could have on District 69 or the other neighboring majority-black districts. In the absence of a statewide plan drawn to comply with overall deviation in population of 2 percent, we cannot conclude that the Democratic Conference plaintiffs have met the first *Gingles* requirement.

The Democratic Conference plaintiffs also argue that Act 603 dilutes the black voting strength in Madison County, but the Democratic Conference plaintiffs have again failed to satisfy the first *Gingles* requirement. The Democratic Conference plaintiffs introduced an illustrative map in which Senate District 7 would be underpopulated by 4.96 percent

and would have a voting-age population that is 45.18 percent white, 46.45 percent black, and 6.51 percent Hispanic. But this illustrative map fails to satisfy the first *Gingles* requirement for the same reasons that the other illustrative maps failed: it does not comply with the overall deviation in population of 2 percent, and it is drawn in isolation instead of as part of a statewide plan. Additionally, the record is not clear that the minority population would reach a majority of the voting-age population in this illustrative district, even if we concluded that the black and Hispanic populations in the area were politically cohesive. Both Rubio and Toussaint testified that a significant number of the Hispanics in the Huntsville area are not eligible to vote because they are not citizens.

3. The Plaintiffs' Claims of Dilution by Packing Fail Too.

Both the Black Caucus plaintiffs and the Democratic Conference plaintiffs also contend that Acts 602 and 603 dilute the strength of black voters by "packing" them into majority-black districts, that is, by "concentrati[ng] . . . blacks into districts where they constitute an excessive majority," *Gingles*, 478 U.S. at 46 n.11, 106 S. Ct. at 2764 n.11, but the record establishes otherwise. As the previous sections explain, neither set of plaintiffs offered any evidence that the Legislature could have drawn another majority-black district for either the House or the Senate as part of a statewide plan with an overall deviation in population of 2 percent. Even though the former districts in

both houses, after the 2010 Census, were systematically and, in many cases, severely underpopulated, the Legislature chose to maintain 8 majority-black districts in the Senate and to increase the number of majority-black districts in the House from 27 to 28 based on total population. Act 602 increased slightly the percentage of the black population in 14 of the former majority-black House districts, decreased slightly the population in the other 13 majority-black House districts, and created 1 new majority-black House district in total population. Act 603 increased slightly the percentage of the black population in 5 of the 8 majority-black Senate districts and decreased slightly the percentage of the black population in the other 3 majority-black Senate districts. The percentages of the black voting-age population in majority-black House districts range from 47.22 percent to 74.28 percent, and the percentages of the black voting-age population in majority-black Senate districts range from 56.43 percent to 72.70 percent. The percentages of black voters in 20 of the 28 majority-black House districts are below 65 percent, and the percentages of black voters in 11 of those House districts are below 60 percent. Only 3 of the 28 majority-black House districts have a black voting-age population in excess of 70 percent, and two of those three districts are underpopulated. The percentages of black voters in 6 of the 8 Senate districts are below 65 percent, and the percentages of black voters in 4 of those Senate districts are below 60 percent. Only 1 majority-black Senate district has a black voting-age population in excess of 70 percent, and that district is

underpopulated. The overwhelming majority of the majority-black districts, under both Acts, remain underpopulated, which is the opposite of what we would expect in a plan that packs black voters into majority-black districts. Of the 28 majority-black House districts, 21 remain underpopulated, and 6 of the 8 majority-black Senate districts remain underpopulated. Even the 8 House districts and 2 Senate districts that are overpopulated are within 1 percent of the ideal population for a district. And the majority-black districts under the Acts are roughly proportional to the black voting-age population. That is, black persons are 24.86 percent of the voting-age population in Alabama, and under the Acts, 22.86 percent of the Senate districts and 26.67 percent of the House districts are majority-black districts. Nothing about Acts 602 and 603 suggests that the Legislature diluted black voting strength through packing.

The plaintiffs complain that the Legislature should have reduced substantially the percentages of black voters in several of the majority-black districts to increase the influence of black voters in adjacent majority-white districts, but there are, at least, two problems with that argument. First, the Supreme Court has held that section 2 of the Voting Rights Act does not require the creation of either influence districts, *League of Latin Am. Citizens,* 548 U.S. at 445, 126 S. Ct. at 2594, or crossover districts, *Strickland,* 556 U.S. at 14, 129 S. Ct. at 1243. These decisions make clear that the central concern of section 2 in

redistricting is the creation of compact, majority-black districts where necessary to allow black voters an opportunity to elect their preferred candidates: "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.* Second, the plaintiffs utterly failed to prove how the Legislature could have accomplished this task. The plaintiffs again offered no evidence that the Legislature could have drawn more majority-black districts. Reed testified at trial that a majority-black district ordinarily needs to be about 60 percent black to allow black voters to elect their candidate of choice, and he stated that sometimes the percentage may need to be closer to 65 percent. And black legislators told the Committee at public hearings that majority-black districts ordinarily needed to have similar percentages of black voters. But the plaintiffs failed to present any evidence of how the Legislature could have drawn, in a statewide plan, the same number of majority-black districts with 60 or more percent black voters in those districts with an overall deviation in population of 2 percent while still increasing the number of influence or crossover districts.

4. Even if the Plaintiffs Had Proved All Three *Gingles* Requirements or the Packing of Black Voters, the Totality of the Circumstances Does Not Support a Claim of Vote Dilution.

Even if the plaintiffs had proved all the *Gingles* requirements or the packing of black voters, they still

would have been required to prove that "the totality of the facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." *De Grandy,* 512 U.S. at 1013-14, 114 S. Ct. at 2658. Relevant factors include the history of voting-related discrimination in the State; the racial polarization of voting in the State; the extent to which the State has used discriminatory voting practices to enhance the opportunity for discrimination against the minority group; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health; the extent to which political campaigns have included overt or subtle racial appeals; the extent to which members of the minority have been elected to public office; the level of responsiveness of elected officials to the needs of a minority group; and the proportionality of majority-minority districts. *See League of United Latin Am. Citizens,* 548 U.S. at 437, 126 S. Ct. at 2620; *Gingles,* 478 U.S. at 36-37, 106 S. Ct. at 2759.

No one can deny the abhorrent history of racial and voting-related discrimination in Alabama. The egregious practices of the past led to some of the landmark decisions in this area of law. *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362 (1964); *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125 (1960). For nearly 50 years, Alabama was subject to the preclearance requirement under section 5 of the Voting Rights Act. *See Shelby Cnty., Ala. v. Holder,* ___ U.S. ___, 133 S. Ct. 2612 (2013).

But that history of discrimination alone cannot establish that these particular Acts would deny minority voters equal political opportunity today. Earlier this year, the Supreme Court declared the coverage formula in section 4 of the Voting Rights Act, which subjected Alabama to the preclearance requirement, to be unconstitutional because Congress had not made sufficient findings to support its conclusion that the preclearance requirement is still necessary in Alabama. As the Supreme Court explained, "[v]oter turnout and registration rates now approach parity," "minority candidates hold office at unprecedented levels," and "[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years." *See id.* at 2625 (internal quotation marks omitted).

We conclude that the totality of the circumstances does not support the conclusion that the Acts would deny black voters an equal opportunity to participate in the political process, and four factors weigh heavily in favor of our conclusion. First, black voters in Alabama are highly politically active. Second, black voters have successfully elected the candidates of their choice in the majority-black districts. Third, the majority-black districts are roughly proportional to the black voting-age population in Alabama. Fourth, the record contains no evidence of racial appeals in recent political campaigns or of a significant lack of responsiveness to the needs of the black population.

First, as the plaintiffs' own experts testified, black voters in Alabama are politically active and

registered to vote in high numbers. Lichtman testified that "[t]oday African American participation in elections in Alabama is at least comparable and likely above white participation." (Ex. NPX 324, 20). And Arrington agreed that "minority voters have become more likely to register and better mobilized," which informed his opinion that majority-black districts could be created with smaller percentages of blacks. (Ex. NPX 323, 19-20). Reed testified that the Alabama Democratic Conference, which is an organization dedicated to the improvement of political opportunities for black voters, is active across the State and endorses candidates in almost every race. And Bernard Simelton testified that the Alabama Chapter of the National Association for the Advancement of Colored People has also worked to build coalitions around the State with Hispanics and Native American groups like the MOWA Band of Choctaw Indians to increase the political influence of black voters.

Second, black voters have successfully elected the candidates of their choice in the majority-black districts. In the House of Representatives, all 27 of the majority-black House districts are represented by Democrats, and 26 of those 27 districts are represented by black Democrats. In the Senate, all of the majority-black Senate districts are represented by Democrats, and seven of those eight districts are represented by black Democrats. (Ex. NPX 350, 60-62). The Acts preserve and indeed increase the number of these majority-black districts.

Third, the majority-black districts are roughly proportional to the black voting-age population. Blacks constitute 24.86 percent of the voting-age population in Alabama. Under the Acts, 22.86 percent of the districts in the Senate will be majority-black districts and 26.67 percent of the districts in the House will be majority-black districts. *See De Grandy*, 512 U.S. at 1020, 114 S. Ct. at 2661 ("[P]roportionality . . . is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization 'to participate in the political process and to elect representatives of their choice.'" (quoting 42 U.S.C. § 1973(b))).

Fourth, the record contains no evidence of racial appeals in recent political campaigns in Alabama or of a significant lack of responsiveness to the needs of blacks. The plaintiffs introduced some testimony about a partisan campaign trick during the last election in which a conservative radio host announced that, because of staffing problems, Democrats should vote a day later than Republicans, but the record establishes that the Secretary of State immediately countered that misinformation. There is no evidence that any state official was involved in the trick. And the evidence establishes that the announcement was directed at Democratic voters generally, not minority voters. The plaintiffs also introduced evidence that Jefferson County recently closed Cooper Green, a hospital that served the indigent population in the County, many of whom are black, but the record establishes that Cooper Green had recently

undergone extensive renovations before the fiscal crisis in the County led to its closure. And the plaintiffs introduced evidence that the Legislature has not been sensitive to the needs of the Hispanic population in Alabama, but that evidence is not relevant to the question whether the Legislature has been responsive to the needs of black voters.

Because the overwhelming evidence in the record suggests that black voters have an equal opportunity to participate in the political process the same as everyone else, we conclude that the totality of the circumstances would not support a claim of vote dilution even if the plaintiffs could establish the *Gingles* requirements.

B. Intentional Discrimination

The plaintiffs next argue that the State defendants engaged in intentional discrimination on the basis of race when they drafted and adopted the new districts in violation of section 2 of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment. The filings and arguments made by the plaintiffs on these claims were mystifying at best. The Black Caucus plaintiffs routinely cited decisions of the Supreme Court on claims of racial gerrymandering, but never identified which districts they alleged were racially gerrymandered and introduced little evidence to prove a discriminatory intent. The Democratic Conference plaintiffs referred to their claims as claims of racial gerrymandering, but

alternated between discussions of specific districts and the Acts as a whole and offered little guidance about how we should evaluate the Acts under strict scrutiny. We were presented with one set of plaintiffs who argued about discriminatory purpose and another set of plaintiffs who argued about strict scrutiny, but no set of plaintiffs who argued both.

We construe the filings as making three different claims based on intentional discrimination. First, we construe the filings of the Black Caucus plaintiffs and the Democratic Conference plaintiffs to argue that the Acts were promulgated for an invidious discriminatory purpose and have the effect of diluting minority voting strength. *See Vill. of Arlington Heights v. Metro. Hous. Dev't Corp.*, 429 U.S. 252, 264-65, 97 S. Ct. 555, 563 (1977). Second, we construe the filings of the Black Caucus plaintiffs and the Democratic Conference plaintiffs as arguing that the Acts as a whole constitute racial gerrymanders. *See Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 2024 (1993). Third, we construe the filings of the Democratic Conference plaintiffs as also arguing that Senate Districts 7, 11, 22, and 26 constitute racial gerrymanders. *See id.* The Democratic Conference plaintiffs lack standing to maintain the claims of racial gerrymandering, and all the claims of intentional discrimination, in any event, fail on the merits.

1. The Plaintiffs Failed To Prove that the Acts Were Motivated by an Invidious Discriminatory Purpose.

The plaintiffs argue that the Acts not only result in the dilution of black voting strength in violation of section 2 of the Voting Rights Act, but were motivated by an invidious discriminatory purpose, in violation of the Fourteenth and Fifteenth Amendments. Although the Supreme Court earlier interpreted section 2 of the Voting Rights Act to require proof of a discriminatory purpose, Congress later amended the statute to allow proof of only discriminatory results. *See Gingles,* 478 U.S. at 43, 106 S. Ct. at 2762. Congress created the results test by deleting the phrase "to deny or abridge" and replacing it with the following language: "in a manner which results in a denial or abridgement of." 42 U.S.C. § 1973(a) (amended 1982). In its amendments, Congress "dispositively reject[ed] the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, [100 S. Ct. 1490] (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." *See Gingles,* 478 U.S. at 43-44, 106 S. Ct. at 2762-63. But insofar as section 2 still forbids purposeful discrimination, it should be interpreted consistently with the Fourteenth and Fifteenth Amendments, which require the plaintiffs to prove both that the redistricting plan was created with an invidious discriminatory purpose and that it results in the dilution of a minority's voting strength. *See Bolden,* 446 U.S. at 62-63, 100 S. Ct. at 1497; *see*

also Rogers v. Lodge, 458 U.S. 613, 617, 102 S. Ct. 3272, 3276 (1982); *White v. Regester,* 412 U.S. 755, 765, 93 S. Ct. 2332, 2339 (1973).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights,* 429 U.S. at 266, 97 S. Ct. at 564. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare." *Id.* When no such pattern emerges, we consider evidence such as "[t]he impact of the official action," "[t]he historical background of the decision," "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," and "[t]he legislative or administrative history." *See id.* at 266-68, 97 S. Ct. at 564-65.

Based on the application of the *Arlington Heights* factors, we conclude that an invidious discriminatory purpose was not a motivating factor in the creation of the Acts. First, the impact of the Acts weighs against a finding of invidious discriminatory purpose because the Acts draw as many majority-black districts as possible within an overall deviation in population of 2 percent and leave many of the majority-black districts underpopulated. Second, the historical background of the decision weighs against a finding of invidious discriminatory purpose because the Legislature used appropriate guidelines to fulfill its

constitutional duty to redistrict itself without judicial intervention, contrary to the discriminatory failures to redistrict that mar the State's past. Third, the sequence of events leading up to the enactment of the Acts weighs against a finding of an invidious discriminatory purpose because Senator Dial and Representative McClendon solicited and incorporated comments from the public and from their colleagues in the Legislature. The Acts adopted large portions of maps provided to Senator Dial and Representative McClendon by black legislators. And the Committee developed the Acts in compliance with neutral districting principles including the preservation of the core of existing districts, the requirement of one person, one vote, and respect for communities of interest. Fourth, the Legislature did not depart from normal procedures to pass the Acts, but followed roughly the same procedures as had the Legislature in 2001 when it enacted the last districts. Indeed, the Legislature improved upon those procedures: the Committee held even more public hearings than had the Committee in 2001; the Committee solicited public comment before the plans were drafted so as to enable the public to have greater influence on the product; and the Legislature passed the Acts in a special session that complied with all normal legislative procedures. Fifth, the record contains no contemporaneous statements made about the redistricting plan that suggest an invidious discriminatory purpose in the creation of the Acts; statements by Republicans that they desired to gain seats with the new districts speak to partisan, not racial, motives.

The Democratic Conference plaintiffs argue that the passage of the Acts in a special session suggests discriminatory intent, but we disagree. The Democratic Conference plaintiffs identify several alleged procedural defects including the failure of the Legislature to redistrict itself in the first regular session after the census as required by the state constitution, the short notice for the final public hearing on the proposed districts, and the efforts of the Republicans to draft the districts behind closed doors. But these facts do not evidence discriminatory intent. The Legislature has never redistricted itself in the first regular session, and the Legislature followed the precedent established in 2001 of drawing the districts in a special session. Senator Dial explained that the Committee conducted the first 21 public hearings before the initial plans were completed to give the public a greater opportunity to comment, in contrast with the public hearings held in 2001 when the plans were presented as a fait accompli. And the final hearing was held on short notice because of the short time left to pass the Acts in the special session.

The Democratic Conference plaintiffs also argue that the drawing of the district lines by Hinaman behind closed doors suggests an invidious racial purpose, but we disagree. As the plaintiffs' own expert conceded, the party in power ordinarily drafts redistricting plans behind closed doors. If anything, the record suggests that the Republicans were more open to discussion with the Democratic members of the Legislature than would be expected, particularly in

the light of the Republican supermajority in each house. Senator Dial and Representative McClendon offered to meet with all of their colleagues, and the record is clear that they met with both Republicans and Democrats and that they incorporated suggestions from Democratic legislators into the plans. Even Hinaman, who contracted to assist the Republicans with the districts, worked on some boundary changes with Democratic representatives in the final week before the passage of the Acts. No invidious racial purpose has been proved about this process.

The Black Caucus plaintiffs and the Democratic Conference plaintiffs also argued that the Acts were the product of a grand Republican strategy to make the Democratic Party the "black party" and the Republican Party the "white party," but the record does not support that theory. Senator Dial and Representative McClendon credibly testified that they had never heard of such a strategy, had no personal interest in any such strategy, and did not even discuss the reapportionment process with the Republican National Committee. And the documentary evidence establishes that the Committee adopted the guidelines for reapportionment before Hinaman arrived to help the Republican leadership draft the new lines and that the only paperwork that Senator Dial and Representative McClendon received from the national party involved election returns and district statistics. The record contains no evidence that the Alabama Republican Party is engaged in any grand strategy to eliminate white Democrats.

2. We Reject the Plaintiffs' Claims of Racial Gerrymandering.

A claim of racial gerrymandering is "analytically distinct from a vote dilution claim." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S. Ct. 2475, 2485 (1995). "Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race, the essence of the equal protection claim [for racial gerrymandering] is that the State has used race as a basis for separating voters into districts." *Id.* The Supreme Court first recognized this equal protection claim in *Shaw,* in which the Court explained that the segregation of races of citizens into different voting districts violates not only the Fifteenth Amendment, as it had previously determined in *Gomillion v. Lightfoot,* 364 U.S. 339, 342-48, 81 S. Ct. 125, 127-30 (1960), but also the Equal Protection Clause of the Fourteenth Amendment. *See Shaw,* 509 U.S. at 645, 113 S. Ct. at 2826.

a. The Black Caucus Plaintiffs Have Standing To Maintain Claims of Racial Gerrymandering Against the Acts as a Whole, but the Democratic Conference Plaintiffs Do Not.

We must decide whether the plaintiffs in each action have standing to challenge the Acts as racial gerrymanders, and "the irreducible constitutional

minimum of standing contains three elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *United States v. Hays,* 515 U.S. 737, 742-43, 115 S. Ct. 2431, 2435 (1995).

The Supreme Court has explained that "[d]emonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another." *Id.* at 744, 115 S. Ct. at 2436. "Only those citizens able to allege injury as a direct result of having *personally* been denied equal treatment may bring a challenge [of racial gerrymandering to a redistricting Act as a whole], and citizens who do so carry the burden of proving their standing, as well as their case on the merits." *Id.* at 746, 115 S. Ct. at 2437. A citizen who files a claim of racial gerrymandering about a particular district will meet the requirement of personal injury when that plaintiff resides in the district that he alleges was the product of a racial gerrymander. *Id.* at 744-45, 115 S. Ct. at 2436. But "where a plaintiff does not live in such a district, he or she does not suffer those special

harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *Id.* at 745, 115 S. Ct. at 2436.

The Alabama Legislative Black Caucus has organizational standing to maintain its claim of racial gerrymandering because its members reside in nearly every challenged district. Ordinarily, "[a]n association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 169, 120 S. Ct. 693, 697 (2000). The parties stipulated that the Alabama Legislative Black Caucus is "composed of every African-American member of the House and Senate." (Doc. 182, 10). The State defendants submitted a list of each house representative that includes the legislator's party and race. (Ex. SDX 459, 1470-72). According to that list, 26 black Democrats are currently incumbents in House districts drawn under the 2001 plan. All black incumbents remain residents of their current House districts under the new House plan because the Legislature was mostly successful in avoiding incumbent conflicts when drawing the new districts. There was an incumbent conflict in House District 60 until the recent death of Representative Newton. All 26 incumbents are members of the Alabama Legislative Black Caucus

and, as individual voters, would have standing to maintain a claim of racial gerrymandering because they are, by necessity, residents of the districts they represent. There is not a corresponding list of each senator that includes the legislator's party and race, but Senator Smitherman, Senator Ross, and Senator Figures are black incumbents who testified at trial about how the new senate plan affected their senate districts. Because the Legislature avoided all incumbent conflicts in the new Senate districts, these senators are residents of the new districts and would have standing as voters to maintain a claim of racial gerrymandering. Like the 26 representatives, all black senators are also members of the Alabama Legislative Black Caucus. The black legislators represent the majority-black House and Senate districts that are the subject of the racial gerrymandering claim. A claim of racial gerrymandering is germane to the purpose of the Alabama Legislative Black Caucus, an unincorporated political organization of African Americans elected to the Alabama Legislature, and the Alabama Legislative Black Caucus represents voters whose rights to equal protection of law would be violated by redistricting plans that constitute a racial gerrymander. And their claim for injunctive relief does not require the participation of individual plaintiffs. Because we hold that the Alabama Legislative Black Caucus has organizational standing, we need not decide whether the Alabama Association of Black County Officials or any of its members have standing.

The Democratic Conference plaintiffs, on the other hand, have not met their burden to establish standing to bring a claim of racial gerrymandering to the Acts as a whole. The record does not clearly identify the districts in which the individual members of the Alabama Democratic Conference reside under the Acts. Without that testimony, we cannot determine whether the plaintiffs were personally subjected to any racial classification when they were assigned to their districts. And the Alabama Democratic Conference similarly offered no specific evidence that any of its members were subjected to a racial classification.

b. We Dismiss the District-Specific Claims of Racial Gerrymandering Filed by the Democratic Conference Plaintiffs for Lack of Standing.

We construe the filings of the Democratic Conference plaintiffs also to present district-specific racial gerrymandering challenges to Senate Districts 7, 11, 22, and 26 under Act 603. But the Democratic Conference plaintiffs have not proved that they have standing to bring any of these claims. The Alabama Democratic Conference presented insufficient evidence that it has members who reside in these districts. And the individual Democratic Conference plaintiffs presented insufficient evidence that they reside in these districts or were otherwise personally subjected to a racial classification during the districting process.

The Alabama Democratic Conference has not proved that it has members who would have standing to pursue any district-specific claims of racial gerrymandering. At trial, Reed testified on behalf of the Conference that it has members in almost every county in Alabama, but the counties in Alabama are split into many districts. The Conference offered no testimony or evidence that it has members in all of the districts in Alabama or in any of the specific districts that it challenged in this matter. Because we cannot conclude, based on the evidence in the record, that the Alabama Democratic Conference has members who would have standing to bring the district-specific claims of racial gerrymandering in their own right, we must dismiss those claims for lack of standing.

And the individual Democratic Conference plaintiffs have failed to prove that they have standing to bring any district-specific claims of racial gerrymandering. None of the individual plaintiffs testified that he or she will reside in any of those districts under the Acts. The parties agree that Toussaint is a registered voter in Madison County, and the record suggests that she voted in the former Senate District 7. (Doc. 176, 15). But the record contains no evidence of her Senate district under the new map. The parties agree that Weaver is a registered voter in Washington County who votes in the former Senate District 22, (Doc. 176, 15), but the record is silent about his assignment to a district under the Acts, (Trial Tr. vol. 4, 44-45, Aug. 13, 2013). And the parties agree that

Pettway is a registered voter in Montgomery County in the former House District 73, (Doc. 176, 15), but the record contains no evidence about either the Senate district where he currently votes or the Senate district where he would vote under the new Acts. None of the individual Democratic Conference plaintiffs reside in Senate District 11.

c. Even if All the Plaintiffs Had Standing To Assert Their Claims of Racial Gerrymandering, Those Claims Would Fail Because Race Was Not the Predominant Motivating Factor in the Creation of the Districts.

Even if all the plaintiffs could establish that they have standing to bring their claims of racial gerrymandering, the claims would fail. Race was not the predominant motivating factor for the Acts as a whole. And race was not the predominant motivating factor for drawing Senate Districts 7, 11, 22, or 26.

"Electoral district lines are facially race neutral, so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of classification based explicitly on race." *Vera,* 517 U.S. at 958, 116 S. Ct. at 1951 (internal quotation marks omitted). On its face, "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses." *Shaw,* 509 U.S. at 646, 113 S. Ct. at 2826. And "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.

Nor does it apply to all cases of intentional creation of majority-minority districts." *Vera,* 517 U.S. at 958, 116 S. Ct. at 1951. But strict scrutiny will apply when a state has subordinated traditional, legitimate districting principles to race, so that race was the predominant factor motivating the decision of the Legislature. *See id.* And when strict scrutiny is invoked, the State must establish that its districting legislation is narrowly tailored to achieve a compelling interest. *Id.*

"Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller,* 515 U.S. at 915, 115 S. Ct. at 2489. "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.* at 915-16. Only when race is the "*predominant* factor motivating the legislature's redistricting decision" will strict scrutiny apply. *Vera,* 517 U.S. at 959, 116 S. Ct. at 1952. "The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller,* 515 U.S. at 916, 115 S. Ct. at 2489.

i. The Acts

When the Legislature undertook the task of drawing the new House and Senate districts after the 2010 Census, the main priority of the Legislature was to comply with the constitutional mandate of one person, one vote. To accomplish this task, the Reapportionment Committee selected a guideline of an overall deviation in population of plus or minus 1 percent, and the Legislature applied this guideline of an overall deviation of 2 percent to every district before satisfying any other redistricting principles. The guidelines adopted by the Reapportionment Committee and the consistent testimony of Senator Dial, Representative McClendon, and Hinaman establish that the Legislature also considered race when required by federal law: the Legislature sought to comply with sections 2 and 5 of the Voting Rights Act by preserving-and, in the House, increasing – the majority-black districts and by not substantially reducing the percentage of black persons in those districts. But the guidelines and the consistent testimony of Senator Dial, Representative McClendon, and Hinaman proved that the State followed the guideline of an overall deviation of 2 percent, without exception, and then applied the following neutral redistricting principles when feasible: to preserve the core of existing districts; to avoid incumbent conflicts; to draw compact and contiguous districts; and to appease incumbents by accommodating their preferences whenever possible. Finally, the Legislature considered partisan data to preserve the Republican

supermajority in the Legislature. "The record does not reflect a history of *purely* race-based districting revisions." *Vera,* 517 U.S. at 959, 116 S. Ct. at 1952 (internal quotation marks omitted).

Although race was a factor in the creation of the districts, we find that the Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations. The Legislature did not create majority-black districts for the first time nor aim to increase or decrease the percentage of the black populations within the majority-black districts, most of which remained in the same geographic areas. The 2010 Census revealed relatively modest growth of the black population in Alabama from 2000 to 2010. (Ex. NPX 325; Ex. NPX 326). But the concentrations of the black population had declined in some areas and shifted in other areas, leaving all majority-black districts significantly underpopulated. And the Legislature moved districts to correspond with population growth and to comply with the overall deviation in population of 2 percent. The Legislature moved House District 53, a majority-black district, from Jefferson County, where there were several severely underpopulated majority-black districts, to Madison County, where the black population had increased and where a new, compact majority-black district could be drawn instead. The Legislature moved House District 73, which had never been a majority-black district, from Montgomery County, another area with underpopulated majority-black districts, to Shelby County, an area with severely

overpopulated majority-white districts. Above all, the Legislature followed a lower overall deviation in population to create more equality among districts throughout the State.

As it corrected the malapportionment of the districts, the Legislature avoided reducing significantly the proportion of black persons in each majority-black district, but it followed no bright-line rule. The Legislature reduced the percentage of black persons in majority-black districts where necessary to achieve other objectives. The Legislature maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible. The new districts are not so "bizarre on [their] face that [they are] unexplainable on grounds other than race," *Shaw,* 509 U.S. at 644, 113 S. Ct. at 644 (internal citations omitted), nor were they approved after the Department of Justice had rejected two previous redistricting plans under a "max-black" plan, *Miller,* 515 U.S. at 907, 115 S. Ct. at 2484, nor is there "overwhelming evidence that the shape[s] [of the districts were] essentially dictated by racial considerations of one form or another," *Vera,* 517 U.S. at 973, 116 S. Ct. at 1958. We find that the Legislature was not predominantly motivated by racial considerations when it adopted the new districts.

When the Legislature adopted a guideline for less deviation in population equality, it reduced, from the outset, its ability to pack voters for any discriminatory

purpose, whether partisan or racial. After the 2000 Census, the Legislature adopted an overall deviation of 10 percent and systematically underpopulated majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated. When the Legislature, after the 2010 Census, adopted a guideline that required a smaller deviation in population equality, it reduced the potential for this kind of discrimination, whether in favor of or against a racial minority. Had the Legislature intended to pack black voters in majority-black districts, after the 2010 Census, the Legislature could have adopted, as before, a guideline that allowed more population inequality and then overpopulated the majority-black districts. But the Legislature did the opposite: it adopted a guideline for greater population equality and slightly underpopulated the vast majority of the majority-black districts. And the guideline for greater population equality limited the ability of the drawer of the district lines, Hinaman, to place more voters of any kind into a particular district.

With a tighter guideline for population equality, geography also limited the potential for discrimination. Voters are not fungible commodities that can be moved anywhere in a state. Hinaman took population concentrations, including racial groups tied to particular geographical locations, as fixed numbers for purposes of drawing the new districts. Hinaman used existing House and Senate districts to draw the new district lines, and his choice of which voters to add or subtract from each district was limited by which

populations abutted the existing districts. Hinaman also could not abandon the previous district lines without invariably creating more incumbent conflicts and disrupting communities of interest.

Above all, the guideline for greater population equality *eliminated* the partisan gerrymander that existed in the former districts. Indeed, this fact explains why both the Black Caucus plaintiffs and the Democratic Conference plaintiffs have challenged the use of an overall deviation in population of 2 percent throughout this litigation and have refused to offer into evidence an alternative statewide plan for redistricting that conforms to this guideline. Although the plaintiffs have argued that this guideline contributed to a racial discriminatory purpose in the design of the new districts, the plaintiffs have advanced that losing argument precisely because they have recognized all along that this guideline eliminates the partisan advantage that the plaintiffs created and enjoyed in the former districting plan.

Our dissenting colleague contends that the Legislature created a "racial quota" for the majority-black districts. He laces his dissenting opinion with myriad uses of the loaded term "quota," but the record, taken as a whole, establishes that the Legislature employed no quota.

Hinaman balanced and satisfied five lawful objectives with respect to the majority-black districts. First, to comply with the guarantee of one person, one vote and avoid litigation of the kind that occurred in

Larios, Hinaman repopulated the majority-black districts, all of which were underpopulated, and brought them within the guideline for population equality. Second, to comply with sections 2 and 5 of the Voting Rights Act, Hinaman maintained the same number of majority-black districts. A decade earlier, the plaintiffs who served as Democratic leaders in the Legislature did the same thing when they drew new district lines, and the plaintiffs do not contend that Hinaman should have done otherwise in 2012. Third, to comply with section 5, Hinaman avoided a significant reduction in the percentages of black voters in the majority-black districts that he preserved. Again, a decade earlier, several of the plaintiffs did the same thing, but now they contend that Hinaman was wrong to do so. Fourth, to assist the passage of the redistricting plan in the Legislature, Hinaman avoided, as much as possible, the placement of more than one incumbent legislator in each district. And fifth, to preserve communities of interest, Hinaman preserved, as much as possible, the core of each existing district. As he had done before for both the federal judiciary and the Legislature in earlier cycles of redistricting, Hinaman ably balanced all these objectives and avoided the pitfalls of racial gerrymandering.

Our dissenting colleague relies on testimony by Senator Dial, Representative McClendon, and Hinaman as proof that race predominated over other considerations in drawing the majority-black districts, but the record establishes that the drafters of the new

districts, above all, had to correct the severe malapportionment that inevitably followed the partisan gerrymander of the previous districts. Senator Dial, for example, testified about redistricting in Jefferson County and explained that the majority-black districts were expanded because they were underpopulated. (Trial Tr. vol. 1, 112-13, Aug. 8, 2013). Senator Dial testified that "[e]very minority district in this state had lost population and had to grow." (Trial Tr. vol. 1, 35, Aug. 8, 2013). He described the need for majority-black districts to comply with the guideline of an overall deviation of 2 percent as the need "to grow," and he repeated that phrase several times during his testimony. (Trial Tr. vol. 1, 36, Aug. 8, 2013) ("[Senator Sanders] realized his district had to grow . . . he gave me some instructions on how he thought his district should grow."); *id.* at 37; *id.* at 41 ("[Senator Figures's] district had to grow also."); *id.* at 44; *id.* at 47 ("Senator Bobby Singleton's district . . also had to grow."); *id.* at 48; *id.* at 55 ("I did not consider any [black percentage] too high, based on what – the plus or minus variance and the fact that the districts had to grow proportionately."); *id.* at 69; *id.* at 109 ("I kn[e]w that the Jefferson County having to grow would affect the other areas."); *id.* at 110 ("I had the numbers of Senator Smitherman's district and how many he had to grow. I knew how many Senator Dunn had to grow and I knew how many that Senator Coleman had to grow."); *id.* at 133; *id.* at 141 ("[Senator Beasley's] district is basically a minority district and had to grow."). Senator Dial further explained, "My goal was, based on what had happened

in prior reapportionments, to not retrogress the minority districts in this state. All of them had to grow by population. And if they grew in population, they had to grow in the same percentage that they already have and not retrogress that district." (Trial Tr. vol. 1, 79, Aug. 8, 2013). And it makes sense that the "first qualification" after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them. Representative McClendon's testimony reflects the same understanding that Senator Dial expressed. Immediately before acknowledging that approval by the Department of Justice was a priority, Representative McClendon explained that the overall deviation of 2 percent "just makes good sense to me." (Trial Tr. vol. 3, 220, Aug. 12, 2013). Although Hinaman testified that he "was concerned [that percentages of the black population significantly lower than the 2001 plans would be considered] retrogression that would be looked upon unfavorably by the Justice Department under Section 5," he also testified that "all [the majority-black districts were] underpopulated [in] comparison to ideal [when he began work on them], and [he] had to find population to repopulate them." (Trial Tr. vol. 3, 145, 122, Aug. 12, 2013). Hinaman explained, "When I was adding population to majority black districts, my goal was not to retrogress the number that they had in 2001, meaning 2010 Census, as applied to the 2001 lines." (Trial Tr. vol. 3, 142, Aug. 12, 2013). Hinaman's concern about retrogression arose only in conjunction with the need to remedy the malapportionment of the majority-black districts and satisfy

the guideline of an overall deviation in population of 2 percent.

The trial testimony of Senator Dial, Representative McClendon, and Hinaman, taken on whole, establishes that the primary reason they added population to majority-black districts was because those districts were severely underpopulated. What population was added to a particular district was then informed by other considerations, including avoiding retrogression and dilution of minority votes. The Committee established the 2 percent guideline as the nonnegotiable baseline for redistricting, and Hinaman satisfied that guideline in every district. And the percentage of black population in many majority-black districts decreased, which supports the inference that Hinaman subordinated racial considerations to the guideline of an overall deviation in population of 2 percent.

Our dissenting colleague faults the Legislature for adding over 120,000 black people to the majority-black House districts, which he states represents "19.7% of the black people in the State of Alabama who did not already live in a majority-black House District," but these skewed statistics do not tell the whole story. After the 2010 Census, every majority-black House District was underpopulated, and many were grossly underpopulated. That problem came about as a result of the partisan gerrymander designed by the Democrat-controlled Legislature a decade earlier. The Legislature had to add large populations to these gerrymandered districts to comply with the

constitutional guarantee of one person, one vote. To avoid a potential violation of section 5 of the Voting Rights Act, Hinaman also added enough contiguous black populations to maintain the same relative percentages of black populations in the majority-black districts. Of course, the Legislature 10 years earlier, led by many of the plaintiffs in this litigation, had done the same thing. To accomplish these tasks in this redistricting cycle, Hinaman moved only 9.8 percent of the total black population in the State of Alabama into the majority-black House districts, which means that more than 90 percent of the total black population remained in the same kind of district where they had resided earlier. And had the Legislature in 2001 complied with an overall deviation of 2 percent like Hinaman did, it would have needed to move 6.6 percent of the total black population in the State of Alabama into the same majority-black House districts instead of only the 5.4 percent it moved to comply with its more lenient overall population deviation of 10 percent.

We agree with our dissenting colleague that all districting principles were subordinated to a single consideration, but our dissenting colleague identifies the wrong one. Our dissenting colleague asserts that race predominated over every other districting principle, but the consistent testimony of Senator Dial, Representative McClendon, and Hinaman established that the constitutional requirement of one person, one vote trumped every other districting principle. Each district in both houses satisfies the guideline of an

overall deviation in population of 2 percent. To comply with that guideline, Hinaman had to repopulate severely underpopulated majority-black districts and depopulate severely overpopulated majority-white districts. While accomplishing this primary task, Hinaman also tried to satisfy sections 2 and 5 of the Voting Rights Act. Our dissenting colleague discounts Hinaman's paramount commitment to population equality and instead faults a few majority-black districts and several precinct splits as examples that the drafters employed a "rigid quota."

Our dissenting colleague, for example, contends that the Legislature gerrymandered Senate District 26 by sifting black voters, but the record proves otherwise. Under the 2001 plan, Senate District 26 covered an expansive area, including the majority of Montgomery County. (Trial Tr. vol. 3, 122, Aug. 12, 2013; Ex. SDX 477). In 2010, District 26 was underpopulated by 11.64 percent and was 72.75 percent black in total population. (Ex. NPX 340; Ex. APX 7). To comply with the 2 percent guideline, Hinaman added portions of Senate District 25 that were located in the City of Montgomery to repopulate District 26 and to maintain roughly the same black percentage of the total population. (Trial Tr. vol. 3, 129-130, Aug. 12, 2013). Hinaman also reassigned to Senate District 25 the largely white rural population in the southeast corner of Montgomery County. (Trial Tr. vol. 3, 128-129, Aug. 12, 2013). This decision increased the total black population in Senate District 26 to 75.22 percent, which is an unremarkable 2.44 percent difference.

(Ex. APX 7). Our dissenting colleague points to this slight increase as proof that black voters were gerrymandered into District 26 because it is over 70 percent black. But Senate District 26 has historically been over 70 percent black: in 1993, District 26 was 70.34 percent black in total population, (Ex. NPX 310, 12); in 2001, District 26 was 71.51 percent black in total population, (Ex. NPX 310, 12); and in 2010, District 26 was 72.75 percent black in total population and 70.87 percent black in voting-age population, (Ex. APX 7). This slow, slight percentage increase of the black population in District 26 does not evidence gerrymandering of black voters; instead, it evidences consistent concentrations of black population in the City of Montgomery. Our dissenting colleague also declares that "the resulting district is not compact," but the exhibit he cites as evidence supports the opposite finding. District 26 is far more compact under the new plan than under the 2001 plan. The district is concentrated in the urban northeast corner of Montgomery County where the City of Montgomery lies instead of stretching across the entire county to envelop sparsely populated rural precincts. (Ex. SDX 476). Communities of interest in that district have been strengthened, the percentage of the black total population has remained relatively constant, and District 26 is now underpopulated by only .08 percent. (Ex. SDX 400).

Our dissenting colleague also contends that Hinaman "hunted" for additional black populations throughout Alabama, but the record again shows

otherwise. For example, the percentage of the black total population of House District 19 decreased substantially under the new plan. In 2001, District 19 was 66.039 percent black in total population. (Ex. SDX 403; Ex. NPX 310). In 2010, it had increased to 70.04 percent black in total population and was underpopulated by 6.9 percent. (Ex. APX 6; Ex. SDX 406). Under the new plan, District 19 is now 61.5 percent black in total population, and it remains underpopulated by .97 percent. (Ex. APX 6; Ex. SDX 403). The record provides many other examples: Hinaman reduced the percentage of black total population from 65.848 to 60.1 in House District 52; from 64.445 to 56.2 in House District 53; from 63.276 to 56.9 in House District 54; from 69.677 to 67 percent in House District 77; from 72.697 to 70.2 in House District 78; from 61.214 to 57.7 in House District 83; from 64.738 to 60.8 in House District 97; from 64.448 to 60 in House District 98; from 66.685 to 59.12 in Senate District 18; from 66.227 to 65.39 in Senate District 19; and from 65.697 to 63.38 in Senate District 20.

Our dissenting colleague cites no credible evidence for his assertion that "Hinaman split . . precincts largely along racial lines statewide." He cites the Democratic Conference plaintiffs' exhibit 357, which is a map of Alabama divided by counties with yellow highlighted areas that represent precinct splits under the Acts. (Ex. NPX 357). Majority-black districts do not overlay this map to show the reader which districts experienced precinct splitting nor does

our dissenting colleague point to any testimony at trial that majority-black districts incurred more precinct splits. Indeed, exhibit 357 shows high concentrations of precinct splitting in 26 counties composed *exclusively* of majority-white House and Senate districts, including Blount, Calhoun, Chambers, Chilton, Clay, Cleburne, Coffee, Colbert, Coosa, Cullman, Dale, Dekalb, Escambia, Etowah, Franklin, Houston, Jackson, Lauderdale, Limestone, Marion, Marshall, Morgan, Shelby, St. Clair, Walker, and Winston Counties. (Ex. NPX 357). Admittedly, precinct splitting occurred in 24 counties that *include* majority-black districts, such as Autauga, Baldwin, Bibb, Choctaw, Clarke, Conecuh, Elmore, Greene, Hale, Jefferson, Lee, Madison, Marengo, Mobile, Monroe, Montgomery, Perry, Pickens, Russell, Sumter, Talladega, Tallapoosa, Tuscaloosa, and Washington Counties. (Ex. NPX 357). But the precinct splits that occurred in some of these counties, like Baldwin, were predominately in the majority-white districts. The map also shows that the Legislature split *zero* precincts in the majority-black counties of Dallas (69.4 percent), Wilcox (72.5 percent), Lowndes (73.5 percent), Bullock (70.2 percent), and Macon (82.6 percent). U.S. Census Bureau, *Census Data Mapper,* (Oct. 18, 2013, 9:12 AM), http://tigerweb.geo.census.gov/datamapper/map.html. It is impossible to determine accurately where the majority of precinct splits occurred based on exhibit 357, and the exhibit does not support the inference that race motivated Hinaman's decision to split any particular precinct. The map, at best, tells the reader that precinct splits occurred throughout the State.

Our dissenting colleague does not cite other documentary evidence for support of his assertion that majority-black districts suffered the brunt of the precinct splits, even though the parties jointly submitted two charts that detail each House and Senate precinct split. The charts show the reader nothing about an improper intent of the Legislature. (Ex. CE 40, CE 41). These charts are over 325 pages long; surely, if the Legislature acted with a racially discriminatory purpose when splitting precincts, the charts would reveal it. (Ex. CE 40, CE 41). But the charts emphasize one point: precinct splits occurred with no discernible pattern. The House and Senate have a total of 3,487 precincts, (Ex. CE 40; Ex. CE 41), and the Legislature split 1,287 of those precincts, (Ex. CE 40; EX. CE 41). Precinct populations range from 0 people in several precincts to 44,728 in the Auburn Precinct in House District 79. (Ex. CE 41, 167). House districts contain as few as three precincts and as many as 81 precincts, and Senate districts contain as few as 10 precincts and as many as 108 precincts. (Ex. CE 40, 41). In the House, the Legislature split 44.2 percent of all precincts, 39 percent of majority-white precincts, and 57 percent of majority-black precincts. (Ex. CE 41). In the Senate, the Legislature split 25.4 percent of all precincts, 26 percent of majority-white precincts, and 23 percent of majority-black precincts. (Ex. CE 40). And the racial composition of the precincts varies. The Dodge City Precinct in House District 12 has 1,415 white people and 5 black people; the McIntyre Precinct in House District 78 has 52 white people and 2,178 black people; and

the Loosier Precinct in Senate District 4 has 590 white people and 2 black people. (Ex. CE 41, 166, 24; Ex. CE 40, 10). Our dissenting colleague does not point to specific precinct splits as evidence of a racially discriminatory purpose, and he cannot do so because the plaintiffs did not introduce evidence of the demographic data relevant to each split. The vast amount of information located in the two charts confirms that nothing can be derived about the intent of the Legislature from the precinct splits.

Our dissenting colleague finds persuasive Cooper's testimony that, "[i]f the only concerns were maintaining 27 majority black districts and achieving a plus or minus 1 percent deviation, you wouldn't need to split anywhere near that many precincts," but Cooper failed to support this statement with any specific evidence nor did he submit to plaintiffs' counsel a map that complies with the guideline of an overall deviation of 2 percent and splits fewer precincts. (Trial Tr. vol. 2, 105, Aug. 9, 2013). Cooper testified that, although he had drawn a plan that conformed to the guideline of an overall deviation of 2 percent, he could not recall how many precinct splits that plan created. (Trial Tr. vol. 2, 85-86, Aug. 9, 2013). Cooper admitted that he "know[s] there were lots of county splits and lots of precinct splits" under the 2001 plan, (Trial Tr. vol. 2, 70, Aug. 9, 2013), and Reed confirmed that "there are going to be some precincts split. There are going to be some split, however you do it," (Trial Tr. vol. 2, 172, Aug. 9, 2013).

Hinaman split many precincts to comply with the guideline of an overall deviation in population of 2 percent. When asked why he would split a voting precinct, Hinaman replied, "I guess the categories for splitting a voting precinct would be for the creation of a black [m]ajority district, for not retrogressing a black [m]ajority district, for deviation *obviously because you had to get to plus or minus 1 percent.* Those would be the normal reasons." (emphasis added). (Ex. APX 75, 117-118). This testimony explains why precinct splitting occurred often in counties with only majority-white districts, and it suggests that at least some of the precinct splits in majority-black districts also were attributable to the 2 percent guideline.

Hinaman honored requests from incumbents too, even when it meant splitting precincts. For example, Hinaman moved 12 people in Greene County from House District 71 and relocated them in House District 61 at the request of Representative Harper who owned a home in Greene County. (Trial Tr. vol. 3, 151, Aug. 12, 2013; Ex. APX 75, 66-67). To accommodate Harper's request, Hinaman had to split two precincts on the border of those two districts, but that split was not motivated by race. Hinaman also adopted in large part Senator Smitherman's proposed plans for Senate Districts 18, 19, and 20 in the Birmingham area. (Ex. APX 68, 3). Hinaman testified that Senator Smitherman's "map did not include any demographic information with it, but . . . I saw that the black population in the proposed new districts was about the same percentage as in the old districts.

That map also split a number of precincts, which I input into the draft plan as they came to me." (Ex. APX 68, 3). Hinaman estimated that he incorporated 90 to 95 percent of Senator Smitherman's map into the Senate plan. (Ex. APX 68, 3).

Taken as a whole, Hinaman's testimony confirms that race was not the predominant motivating factor in precinct splitting. And, even where it occurred, precinct splitting was less of an evil to be avoided in redistricting than the subordination of other redistricting criteria, such as compliance with the Constitution and the Voting Rights Act. *See Larios,* 314 F. Supp. 2d at 1360 (stating that traditional districting principles "of *compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest*" were secondary to ensuring compliance with the Constitution and the Voting Rights Act) (emphasis in original); Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471-01 (explaining that "compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain redistricting criteria," such as precinct splitting, "to avoid retrogression").

Our dissenting colleague also fails to highlight several notable statistics that undermine his argument about racial gerrymandering. First, he observes that "[s]even house districts and three senate districts have an even higher percentage of black population than before," but the more informative statistics are that 13 House districts and 3 Senate

districts have lower percentages of black populations than before. (Ex. SDX 403; Ex. NPX 310). Second, our dissenting colleague asserts that incumbency protection was subordinated in favor of race-based decisions, but he ignores the undisputed facts that Hinaman avoided all incumbency conflicts in the Senate and permitted only two conflicts in the House. Neither of those House conflicts remains because afterward Representative Newton died and Representative Hubbard moved his residence. Third, our dissenting colleague cites the number of majority-black House and Senate districts that are "within one percentage point of the goal of maintaining the same percentage of black residents," but he fails to mention that there are 5 majority-black House districts below 60 percent under the new plan in contrast with only 2 majority-black House districts below 60 percent under the 2001 plan and only 1 majority-black House district below 60 percent under the 1993 plan. (Ex. SDX 403; Ex. NPX 310).

The Black Caucus plaintiffs argue that the percentages of black populations in the majority-black districts evidence that race was the predominant factor when the Legislature drew the new House and Senate plans, even though these percentages closely resemble the percentages that the Black Caucus endorsed and helped to enact into law only a decennial census ago. Our dissenting colleague joins their lament and expresses frustration with the "high percentages" of the black population in the majority-black districts although he acknowledges that "conditions 30 years ago or 20 years ago or even a decade

ago (in or around 2001) may have justified" them. These arguments beg a question: what has changed in the last few years to support the conclusion, from the perspective of the Black Caucus plaintiffs, that the new majority-black districts are unconstitutional when the old majority-black districts were constitutional? The answer is simple: the Republicans now control the Legislature instead of the Democrats.

Our dissenting colleague states that "it appears that the only racial dynamic at play in Alabama's plans is that the white members of the Alabama legislature, and the white ones alone, have expressly and specifically targeted black legislators and the members of their districts for difference in treatment solely because of the race of those legislators and over those black legislators vocal objections," but our dissenting colleague ignores the stronger evidence that partisanship explains what happened here. As in the last round of redistricting, the vote to approve the new districts fell on party lines, not racial lines. Republicans, with supermajorities in both houses of the Legislature, voted together in favor of the new districts. White Democrats voted with black Democrats against the new districts. At trial, three white Democrats testified in support of the plaintiffs' complaints: Senator Tammy Irons, Senator Marc Keahey, and Representative Joe Hubbard. In 2001, when Democrats controlled the Legislature, they created a partisan gerrymander that substantially underpopulated majority-black districts and maintained the same relative percentages of black population in

those districts. But in 2012, the same Democratic leaders filed these actions to complain that it was wrong for the Republicans to demand greater population equality among districts while maintaining the same relative percentages of black population in the majority-black districts. The Democratic leaders complain about maintaining the relative percentages of black population in districts they designed even after the voters of these districts elected these very Democratic leaders. The Democratic leaders complain of racial unfairness even though black legislators – Senator Rodger Smitherman and Representative Thad McClammy – helped draw the new lines for the majority-black districts. They complain of racial unfairness after they told Senator Dial and Representative McClendon in public hearings that the majority-black districts needed to be at least 60 percent black. They complain of racial unfairness even though they presented testimony at trial from Dr. Joe Reed, the dean of redistricting in Alabama, that the majority-black districts ordinarily should be 60 percent black and sometimes 65 percent black. To suggest that race is the only dynamic at play here is absurd.

We also reject our dissenting colleague's comparison of this controversy to the landmark decision in *Gomillion*. These consolidated actions challenge district lines that preserve majority-black districts in the Legislature that several of the plaintiffs helped create, and the redistricting Acts maintain an unprecedented level of population equality for those districts. Let us not forget too that the Attorney General

of the United States precleared these new districts. This political landscape offers no parallel to the nakedly racist decision of the Alabama Legislature in 1957 to alter the municipal boundaries of Tuskegee "from a square to an uncouth twenty-eight-sided figure" so as "to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 340-41, 81 S. Ct. at 126-27. Our colleague compares the plight of Senator Figures, the Democratic leader of the Alabama Senate, with the discrimination against Dr. Gomillion, but Senator Figures voted for majority-black districts with similar percentages of black voters a decade ago. And her vote supported a partisan gerrymander that deliberately discriminated against Republican voters. Now that Senator Figures has had her political power diminished by the voters of Alabama, in an election conducted with the districts that favored her party, she seeks to have this Court enter the partisan fray and change the rules for redistricting for her future political benefit. Her position of diminished, though substantial, political power looks nothing like the disenfranchised status of Dr. Gomillion.

We refuse to apply a double standard that requires the Legislature to follow one set of rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it. After the 2000 Census, nothing changed that would have relaxed the constitutional and statutory standards that governed redistricting. On the contrary,

in 2006, Congress amended section 5 of the Voting Rights Act to make the standard for retrogression "more stringent." *Shelby Cnty.*, 133 S. Ct. at 2617. And in *Larios*, a three-judge district court in this Circuit expressed concern that an overall deviation in population of 10 percent was no longer a "safe harbor" for purposes of the one person, one vote command of the Equal Protection Clause, particularly in the light of developing technology that makes it possible to achieve substantially greater population equality. At trial, the plaintiffs offered no credible evidence that the percentages of the black population in the majority-black districts adopted only ten years earlier were no longer warranted. Although Arrington opined that a 51 percent black majority is now sufficient to allow black voters to elect their preferred candidates of choice, he offered no election data for any of the majority-black districts in Alabama to support that conclusion. (Ex. NPX 323, 15, 17). Arrington admitted that he testified in another action in 2000 regarding a four-district plan for Dallas County, Alabama, that a district in which black persons made up a voting-age population of 61 percent would be considered "a swing district" that would offer only an opportunity for black voters to elect the candidate of their choice, not a guarantee that black voters would be able to elect the candidate of their choice. (Trial Tr. vol. 3, 80-81, Aug. 12, 2013). And Arrington acknowledged that "I haven't drawn any plans for Alabama, so I don't know some of the nitty-gritty of some of the districts." (Trial Tr. vol. 3, 58, Aug. 12, 2013). Reed testified, on the other hand, that a majority-black district in Alabama

ordinarily needs to be about 60 percent black in total population to allow black voters to elect their candidate of choice and, in some cases, might need to be closer to 65 percent. (Trial Tr. vol. 1, 156-57, Aug. 8, 2013). Reed has, of course, been the chairman of the Alabama Democratic Conference since 1970 and has designed several redistricting plans in Alabama. As he testified at trial, "I've been involved in reapportionment legislation and litigation [in Alabama] for many years. . . . I've been actively involved in drawing district lines and participating in the reapportionment process, as well as drafting plans for reapportionment, the Legislature, state board of education, and many, many local jurisdictions." (Trial Tr. vol. 2, 154, Aug. 9, 2013). We credit Reed's testimony based on his wealth of experience in redistricting and elections in Alabama.

Our dissenting colleague ponders, "I feel as if I were in a time warp carried back into the past, with the arguments being the same but the parties having switched sides," but we see the problem here as involving a rule of "heads I win, tails you lose." This record offers no reason to conclude that the rules for redistricting were turned upside down when Republicans gained control of the Alabama Legislature. The parties have switched sides, but the law that governs their disputes remains the same. We refuse to read the Voting Rights Act and the Fourteenth and Fifteenth Amendments as mandating some kind of "Democratic candidate protection program." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act,* 117 Yale L.J. 174, 223 (2007).

ii. Senate District 7

The Democratic Conference plaintiffs argue that the Legislature subordinated traditional redistricting principles when it drew Senate District 7. Under the 2001 plan, Senate District 7 is located entirely within Madison County and runs from the Alabama-Tennessee border down the center of the County through Huntsville. The district divides into two feet-like segments at the bottom. According to the 2010 Census, the 2001 Senate District 7 had a total population that was 60.28 percent white and 32.14 percent black. The left foot of the district reached into a small portion of southwest Huntsville known as "Little Mexico" because its population is largely Hispanic. The majority-white district was overpopulated by 9.04 percent and surrounded by other majority-white districts that were also overpopulated. District 2, its western neighbor, was overpopulated by 31.12 percent. Senator Dial refereed extensive negotiations between the Republican incumbent in District 7 and the Republican incumbents from the neighboring districts. Under the final plan, Act 603 brings District 7 within the target deviation by eliminating the left foot of the district and moving 10,151 blacks from the western edge of the district into District 1, a majority-white district represented by a Democrat. Although District 1 had not previously shared a border with District 7, the Act brought the majority-white district across the northern border of the State into Madison County to gain this population. Under the new plan, District 7 has a total population that is 65.56 percent

white and 27.34 percent black. (Ex. SDX 400). It is more compact than its predecessor and is still located entirely within Madison County.

We find that the Legislature did not subordinate traditional redistricting principles to race when it created District 7. The Legislature maintained most of District 7 in accordance with the traditional respect for existing districts. The Legislature reduced the population in Senate District 7 to bring it within the allowable range of population deviation in an effort to comply with the requirement of one person, one vote. After extensive negotiations among the Republican incumbents, the Legislature took the excess population from the western edge and put the population, which is largely black and votes heavily Democratic, in the district of a Democratic incumbent. The new district is more compact, falls within the target population deviation, and maintains a substantial minority population. We find that the new district lines comply with traditional redistricting principles and that the movement of the black population from the western edge of the district was made largely for partisan, not racial, purposes. *See Vera,* 517 U.S. at 968, 116 S. Ct. at 1956 ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify. . . .").

iii. Senate District 11

The Democratic Conference plaintiffs next argue that the Legislature subordinated neutral districting principles to race when it drew Senate District 11. District 11 changed substantially in Act 603. Under the old plan, District 11 had a crescent shape that included all of Talladega County, Coosa County, and a small portion of Elmore County. In 2010, District 11 was underpopulated by 8.39 percent and had a total population that was 62.59 percent white and 33.95 percent black. (Ex. SDX 402). Under Act 603, District 11 has moved north and now follows the shape of a backwards C that begins in the southern part of St. Clair County, swoops through Talladega County, and ends in the southwestern portion of Shelby County. The new plan moves the central portion of Talladega County, which has a substantial black population, into District 15 with a portion of Shelby County, which is heavily white. (Trial Tr. vol. 3, 173, Aug. 12, 2013). The total population of District 11 is 81.66 percent white and 14.96 percent black. (Ex. SDX 400).

The Democratic Conference plaintiffs have not proved that the Legislature subordinated neutral districting principles to race when it created District 11. Despite substantial shifts of other districts, Hinaman preserved the core of the district in Talladega County, where the incumbent lived. Hinaman also largely followed county lines on the western borders. The district is also contiguous and complies with the overall deviation in population of 2 percent. Although the Democratic Conference plaintiffs introduced evidence

that the maps could have been drawn to make District 11 more compact by swapping the population from Shelby County in District 11 with the population from Talladega County in District 15, that fact does not establish that race was the predominant factor. Partisanship could have similarly explained the decision to place the central portion of Talladega in District 15. As Reed testified, a redistricting plan can be drawn many ways, and we find that the evidence does not support a finding that race predominated over other factors in the creation of this district. Even if the Democratic Conference plaintiffs could prove that they have standing to bring their claim of racial gerrymandering about Senate District 11, the claim would fail because we find that the Legislature did not subordinate neutral districting principles when it drew that district.

iv. Senate District 22

The Democratic Conference plaintiffs next argue that the Legislature subordinated neutral districting principles to race when it drew Senate District 22. District 22 is a sprawling district located in southwest Alabama. In 2010, District 22 had a total population that was 65.96 percent white, 28.30 percent black, and 3.44 percent Native American. (Ex. SDX 402). It is sandwiched between the Black Belt to its north and the Mobile County area to its south. Although its population was within 1 percent of the ideal population in 2010, it bordered several severely malapportioned districts. The majority-black districts

to its north were underpopulated by 42,357 people. The three districts located within Mobile County to its south were underpopulated by 15,656 people. And the district located in Baldwin County to its south was overpopulated by 19,055 people. Although the drafters considered whether they could bring one of the districts in Mobile County across Mobile Bay to capture some of the overpopulation from Baldwin County, the Republican incumbent in Baldwin County objected to that proposal. Because of that objection, Act 603 extended District 22 into Baldwin County and reduced its population in Mobile County, thereby dividing the MOWA Band of Choctaw Indians among three districts. Act 603 also repopulates the majority-black districts from contiguous portions of the former District 22. Despite these population shifts, District 22 maintains a similar shape under the Act and crosses into all of the same counties that it had crossed into in 2001. The total population of the district is 73.17 percent white, 21.52 percent black, and 2.68 percent Native American.

We find that the Legislature did not subordinate traditional neutral districting principles to race when it drew District 22. The need to bring the neighboring districts into compliance with the requirement of one person, one vote served as the primary motivating factor for the changes to District 22. The protection of the interests of incumbents also served as a motivating factor to the changes to District 22 because the drafters decided to bring District 22 into the overpopulated areas of Baldwin County in part because the

incumbent rejected any proposal in which a district from Mobile County would cross Mobile Bay into Baldwin County. Finally, the preservation of existing districts served as a motivating factor in the shape of District 22 and the locations at which it crossed county boundaries. Although the Legislature moved the northern boundaries of District 22 to repopulate the majority-black districts without retrogression, that decision was motivated as much by the effort to comply with the requirement of one person, one vote as by the effort to avoid retrogression. Finally, there is a practical, geographical feature that materially restricts redistricting options in Mobile County: it is cabined in by Mississippi, the Gulf of Mexico, and Mobile Bay. And, on this record, we cannot find that the effort to avoid retrogression or to preserve the majority-black district "had a qualitatively greater influence on the drawing of the district lines" than the other traditional criteria. *See Vera,* 517 U.S. at 969, 116 S. Ct. at 1956.

v. Senate District 26

The Democratic Conference plaintiffs did not plead in their complaint a claim of racial gerrymandering about District 26, but we heard substantial testimony about Senate District 26 at trial. District 26 is a majority-black district in Montgomery County currently represented by Senator Quinton Ross (D). Under the old plans, Senate District 26 included most of Montgomery County, following the county lines, except for a boot shaped segment of Montgomery

included within District 25. In 2010, District 26 was underpopulated by 11.64 percent and had a total population that was 22.03 percent white and 72.75 percent black. To repopulate District 26, Hinaman added populous precincts in the City of Montgomery, which shared many characteristics with the other areas of District 26 and included both black and white persons. Hinaman removed most of the rural portion of Montgomery County from District 26 to create a land bridge between the former area of District 25 and Crenshaw County. As Hinaman explained, District 25 needed to gain population when Act 603 moved District 30 entirely north of Montgomery. Under the new plans, District 26 is still slightly underpopulated and has a total population that is 19.51 percent white and 75.22 percent black.

The Democratic Conference plaintiffs have failed to prove that the Legislature subordinated neutral districting principles to race when it created District 26. Race was a factor in the drawing of District 26. The Legislature preserved the District as majority-black and the percentage of the population that was black. But the Legislature also preserved the core of the existing District. District 26 follows the county lines at its northwestern border and follows the existing district lines along its northeastern border.It maintains a similar shape around the City of Montgomery, and it includes two protrusions into Montgomery County that largely follow highway lines. The inclusion of additional precincts in the City of Montgomery north of Alabama Route 80 is a reasonable

response to the underpopulation of the District. On this record, we cannot find that the Legislature subordinated traditional districting principles to race.

Because the Democratic Conference plaintiffs failed to prove that the State subordinated traditional districting criteria when they drew Senate Districts 7, 11, 22, and 26, we need not consider whether the Districts would satisfy strict scrutiny. The claims of racial gerrymandering fail.

4. Even if the Plaintiffs Had Proved that the Acts Were Primarily Motivated by a Discriminatory Purpose, the Acts Would Satisfy Strict Scrutiny.

Even if the State defendants had subordinated traditional districting principles to racial considerations when they drew the challenged Districts, the Districts would satisfy strict scrutiny. Although the Supreme Court has never decided whether compliance with the Voting Rights Act is a compelling state interest, we conclude that compliance with the Act is a compelling state interest. *See* U.S. Const. Art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also League of United Latin Am. Citizens,* 548 U.S. at 518, 126 S. Ct. at 2667 (Scalia, J., joined by Chief Justice Roberts and Justices Thomas and Alito, concurring in part and

dissenting in part) (concluding that "compliance with § 5 of the Voting Rights Act can be [a compelling state] interest . . . [otherwise] a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause"). And we conclude that a plan will be narrowly tailored to achieve that interest when the race-based action taken was reasonably necessary under a constitutional reading and application of the Act. *See Miller v. Johnson,* 515 U.S. 900, 921, 115 S. Ct. 2475, 2490-91 (1995); *see also Shaw v. Hunt,* 517 U.S. 899, 916, 116 S. Ct. 1894, 1906 (1996) (holding that where the claimed interest is avoidance of liability under section 2, "the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored"); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 161, 97 S. Ct. 996, 1007 (1977) ("Implicit in [our previous cases] is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5.").

The Alabama Legislature maintained the number of majority-black districts and avoided significantly decreasing the percentages of black voters in those districts to comply with section 5 of the Voting Rights Act. All parties agree, and our dissenting colleague admits, that "Senator Dial and Representative McClendon believed that their obligation under the

Voting Rights Act included preserving the existing number of black majority districts." (Doc. 176, 8). We find that Senator Dial and Representative McClendon also believed that they needed to maintain approximately the same percentages of black voters in those majority-black districts to avoid retrogression of black voting strength in violation of section 5 of the Voting Rights Act. And we find that Senator Dial and Representative McClendon believed that any significant reduction of the black population in the majority-black districts would also likely cause a problem with preclearance of the plans by the Department of Justice.

The Black Caucus plaintiffs argue that, in *Shelby County, Alabama v. Holder*, ___ U.S. ___, 133 S. Ct. 2612 (2013), the Supreme Court nullified the interest of the State defendants in complying with section 5 of the Voting Rights Act, but we disagree. In *Shelby County*, the Supreme Court declared the coverage formula in section 4 of the Voting Rights Act unconstitutional because it was "based on decades-old data and eradicated practices." *Id.* at 2627. *Shelby County* expressed no opinion about the constitutionality of section 5 and, even if it had, that decision would not change our analysis. All parties agree that the State of Alabama was governed by the preclearance requirement of section 5 when the Committee drafted and the Legislature approved the new districts. We evaluate the plans in the light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that

exempted Alabama from future coverage under section 5 of the Voting Rights Act.

But we cannot uphold the districts unless the Acts are narrowly tailored to comply with section 5. "Although [the Supreme Court] ha[s] not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), [the Supreme Court] ha[s] always expected that the legislative action would substantially address, if not achieve, the avowed purpose." *Hunt,* 517 U.S. at 915, 116 S. Ct. at 1905. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Johnson,* 515 U.S. at 926, 115 S. Ct. at 2493 (quoting *Beer v. United States,* 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976)). "By enacting section 5, Congress aimed to guarantee that minorities' new gains in political participation would not be undone." *Texas v. United States,* 831 F. Supp. 2d 244, 250 (D. D.C. 2011).

When the Legislature confronted the task of redistricting after the 2010 Census, Congress had recently made the standard for preclearance under section 5 of the Voting Rights Act "more stringent." *Shelby Cnty.,* 133 S. Ct. at 2617. In 2006, Congress extended the operation of section 5 and amended its text "to prohibit more conduct than before." *Id.* at 2621. Congress stated in its findings that "[t]he effectiveness of the Voting Rights Act of 1965 has been

significantly weakened by the United States Supreme Court decisions in [*Reno v. Bossier Parish School Board,* 528 U.S. 320, 120 S. Ct. 866 (1997), and *Georgia v. Ashcroft,* 539 U.S. 461, 123 S. Ct. 2498 (2003),] which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub.L. No. 109-246, § 2, 120 Stat. 577, § 2(b)(6) (2006). *See generally Pamela S. Karlan, Georgia v. Ashcroft and the Retrogression of Retrogression,* 3 Election L.J. 21, 36 (2004) (describing *Georgia v. Ashcroft* as "itself a retrogression in minority voters' effective exercise of the electoral franchise").

In *Reno v. Bossier Parish,* the Supreme Court ruled that section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose," 528 U.S. at 341, 120 S. Ct. at 878, but Congress overturned that decision and amended section 5 to prohibit any change in voting practice or procedure with a racially discriminatory purpose. In *Bossier Parish,* the plaintiffs argued that the Bossier Parish School Board had a racially discriminatory purpose when it refused to create any majority-black districts, even though the black population of that jurisdiction was approximately 20 percent of the total population. *Id.* at 323-24, 120 S. Ct. at 869. The Supreme Court ruled that it was irrelevant whether the Board acted with a racially

discriminatory purpose so long as its redistricting plan was not enacted with a retrogressive purpose. The Court explained that "§ 5 prevents nothing but backsliding, and preclearance under § 5 affirms nothing but backsliding." *Id.* at 335, 120 S. Ct. at 875. Congress rejected this interpretation by adding the following language to section 5: "[t]he term 'purpose' . . . shall include *any* discriminatory purpose." Voting Rights Act § 5(c), 42 U.S.C. § 1973c(c) (emphasis added).

In *Georgia v. Ashcroft,* the Supreme Court ruled that section 5 allows states to consider "the totality of the circumstances," including "the extent of the minority group's opportunity to participate in the political process [and] the feasibility of creating a non-retrogressive plan," 539 U.S. at 479, 123 S. Ct. at 2511, when drawing district lines, but Congress overturned that holding and limited consideration to the minority voters' ability to elect their preferred candidate. 42 U.S.C. § 1973c(d). In *Georgia,* the Court stated that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of choice . . . [because this factor] cannot be dispositive or exclusive." 539 U.S. at 480, 123 S. Ct. at 2511. The Court also explained that section 5 "gives States flexibility to choose," *id.* at 482, 123 S. Ct. at 2512, between two options: a covered jurisdiction may either create "safe" majority-black districts "in which it is highly likely that minority voters will be able to elect the candidate of their choice," *id.* at 480, 123 S. Ct. at 2511, or spread out minority

voters over a greater number of districts where the voters "may have the opportunity to elect a candidate of their choice," *id.* at 481, 123 S. Ct. at 2512. The Court stated that the "other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process," including whether the new plan creates "'influence districts'-where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482, 123 S. Ct. at 2512. The Court reversed a denial of judicial preclearance because the district court had "focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts." *Id.* at 490, 123 S. Ct. at 2516. The Court then remanded for the district court to consider whether a districting plan that reduced the percentages of black voters in several majority-black districts and increased the number of influence districts was retrogressive. *Id.* at 491, 123 S. Ct. at 2517. Congress rejected the interpretation in *Georgia* and "sought to make clear that it was not enough that a redistricting plan gave minority voters 'influence'; a plan cannot diminish their ability to elect candidates." *Texas,* 831 F. Supp. 2d at 251. "In making its Amendments, Congress sought to restore the 'ability to elect' standard promulgated by the Supreme Court in *Beer* [*v. United States,* 425 U.S. 130, 96 S. Ct. 1357 (1976)]." *Id.* at 260.

To overturn *Bossier Parish* and *Georgia,* Congress added subsections (b) through (d) to section 5 to prohibit "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice" and stated that the purpose of that new language was "to protect the ability of such [voters] to elect their preferred candidates of choice." Voting Rights Act § 5, 42 U.S.C. § 1973c. "The 2006 Amendments clarified that Congress intended a Section 5 inquiry to focus on whether a proposed voting change will diminish the 'ability of minority citizens *to elect* preferred candidates of choice.'" *Texas,* 831 F. Supp. 2d at 251 (quoting H.R. Rep. No. 109-478, at 71, 2006 U.S.C.C.A.N. at 671). The relevant question now is "whether the candidate minorities voted for in the general election under the benchmark plan is equally likely to win under the new plan. If not, then minorities' ability to elect their preferred candidate is diminished." Nathaniel Persily, *The Promise & Pitfalls of the New Voting Rights Act,* 117 Yale L.J. 174, 223 (2007).

To comply with this "more stringent" version of section 5, *see Shelby Cnty.,* 133 S. Ct. at 2617, the Alabama Legislature correctly concluded that it could not reduce the number of majority-black districts and that it could not significantly reduce the percentages of black voters in the majority-black districts because to do so would be to diminish black voters' ability to elect their preferred candidates. Congress eliminated the option that a state could choose, under *Georgia,* to

create "opportunity" or "influence" districts instead of "safe" districts that guarantee the ability of minorities to elect their preferred candidates. The 2006 amendments created one consideration for a state: whether minority voters are *less able to elect* their preferred candidate under the new plan, not whether they have the *opportunity to elect* their preferred candidate. *See Texas,* 831 F. Supp. 2d at 261. Congress limited the redistricting options of states so that any diminishment in a minority's ability to elect its preferred candidates violates section 5. Contrary to the plaintiffs' arguments, the Legislature could not spread black voters out to other districts and substantially reduce the percentages of black voters within the majority-black districts because that change, by definition, would diminish black voters' ability to elect their preferred candidates. To comply with section 5, the Alabama Legislature chose the only option available: to protect the voting strength of black voters by safeguarding the majority-black districts and not substantially reducing the percentages of black voters within those districts. The purpose of section 5 has always been to insure that minorities did not lose the political gains they have acquired, and "plans that preserve or actually increase minority voting strength [are not retrogressive]." *Texas,* 831 F. Supp. 2d at 250.

The Legislature sought to avoid diminishing black voters' ability to elect their preferred candidates. The Legislature preserved, where feasible, the existing majority-black districts and maintained the

relative percentages of black voters in those majority-black districts. The Acts maintain 8 majority-black districts in the Senate and increase the number of majority-black districts in the House from 27 to 28 based on total population. The population levels in the existing majority-black districts had proven sufficient to provide the black voters in those districts the opportunity to elect the candidates of their choice. All of the current 27 majority-black House districts are represented by Democrats, and 26 of those 27 districts are represented by black Democrats. (Ex. NPX 350, 60-62). All of the majority-black Senate districts are represented by Democrats, and 7 of those 8 districts are represented by black Democrats. Using the 2010 Census data, the percentages of the black voting-age populations in the majority-black districts under the Acts remain relatively constant when compared to the 2001 plans. The percentages of the black voting-age populations in 21 of the 28 majority-black House districts vary less than plus or minus 5 percent. (Ex. APX 6). And 16 of the 28 majority-black House districts vary less than plus or minus 2 percent. (Ex. APX 6). The largest deviation occurs in House District 59 where the black voting-age population increased from 64.25 percent to 74.28 percent. (Ex. APX 6). But the Legislature fairly balanced the overall percentages of the black voting-age populations in the majority-black House districts, with 13 districts decreasing and 15 districts increasing. (Ex. APX 6). The deviations in percentages of the black voting-age populations in the majority-black Senate districts are perfectly divided: 4 decreased and 4

increased. (Ex. APX 7). And 4 of the 8 majority-black Senate districts vary less than plus or minus 2 percent. (Ex. APX 7). The largest deviation occurs in Senate District 20 where the black voting-age population decreased from 74.44 percent to 59.03 percent. (Ex. APX 7).

We conclude that the Acts are narrowly tailored to comply with section 5 as amended in 2006. The Legislature correctly concluded that the more stringent version of section 5 that Congress enacted in 2006 required the Legislature to maintain, where feasible, the existing number of majority-black districts and not substantially reduce the relative percentages of black voters in those districts. And our conclusion is consistent with the decision of the Department of Justice to preclear the Acts.

Our dissenting colleague disagrees with our reading of section 5 and contends that the new districts fail strict scrutiny, but he declines to explain how the Legislature could have satisfied section 5 without maintaining the same number of majority-black districts and the same relative percentages of black voters in those districts. Our dissenting colleague never denies that section 5 prohibited the Legislature from reducing the overall number of majority-black districts in the House and Senate, and the plaintiffs also do not suggest otherwise. Our dissenting colleague instead argues that section 5 permitted, but somehow did not require, the Legislature to maintain the same relative percentages of black voters in the majority-black districts. We are left to wonder how

the Legislature could have applied our dissenting colleague's vague standard of changes that are both required and permitted without violating the plain text of the amended section 5, which forbids "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b).

Our dissenting colleague gives the Legislature no credit for relying on the best evidence available to them. The Republican-controlled Legislature followed the example of their Democratic colleagues who a decade earlier, when members of the Black Caucus were majority leaders, corrected the malapportionment of the majority-black districts by adding similar percentages of black voters to those districts. The Legislature followed that example from an era when section 5 allowed states more flexibility in redistricting, and Alabama nevertheless obtained preclearance under the stricter standard adopted by Congress in 2006. The leaders of the Reapportionment Committee also followed the advice of black legislators who stated at public hearings that the majority-black districts ordinarily needed to be at least 60 percent black in total population. And the leaders of the Committee sought the assistance of black legislators in drawing the new majority-black districts and then incorporated virtually all of their suggestions for the design of those districts.

Our dissenting colleague instead faults Hinaman for failing to review unidentified "studies of black

voter participation in Alabama" and credits the least credible witness on this topic, Arrington, who testified that the new districts "are part of a strategy to put the Republican Party in the same position that the segregationist white-only Democratic Party occupied in Alabama." (NPX 323 at 13). But our dissenting colleague ignores the credible testimony of the Chairman of the Democratic Conference, Reed, that majority-black districts in Alabama ordinarily need to be 60 percent black and sometimes 65 percent black.

Our dissenting colleague charges that "[t]here is a cruel irony" in allowing Alabama to take credit for complying with section 5 even though state leaders argued successfully in *Shelby County* that the coverage formula in section 4 was so outdated as to be unconstitutional, but we see the irony working in the opposite way. The Voting Rights Act was enacted in an era when Alabama persistently defied federal authority and could not be trusted to enact racial-neutral laws in voting. *See, e.g., Beer v. United States,* 425 U.S. 130, 140, 96 S. Ct. 1357, 1363 (1976); H.R. Rep. No. 89-439, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. But nearly a half-century later Alabama had a record of regular compliance with section 5. The Department of Justice had not even objected to a state-wide preclearance submission in more than 16 years, and in the decade before the amendment of section 5 in 2006, the Department had not objected to any submission from any level of government – state, county, or municipal – save for one submission from the City of Calera. *See* Brief of State

of Alabama as Amicus Curiae Supporting Petitioner at 12, *Shelby Cnty., Ala. v. Holder*, ___ U.S. ___, 133 S. Ct. 2612 (2013) (No. 12-96). Governor Wallace and segregation are long gone, and Alabama has virtually eliminated any racial gap in voter registration or participation. *See id.* at 11. Even though state leaders expressed the view that Alabama now deserves to be treated on equal footing with other states, for decades they nevertheless obeyed section 5 because controlling precedents of the Supreme Court held that this extraordinary measure remained operative. The real irony would come from punishing Alabama for striving in good faith to comply with section 5 even though that law was enacted to remedy a pattern of defiance and evasion.

III. CONCLUSION

Redistricting has been called a "political thicket," *see Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct. 1198, 1201 (1946), where judicial decrees can "cut deeply into the fabric of our federalism," *Reynolds*, 377 U.S. at 624, 84 S. Ct. at 1414 (Harlan, J., dissenting), but our review of a redistricting plan, once adopted, is limited. We do not consider whether a redistricting plan is "bad," as Reed described the redistricting Acts adopted by the Legislature last year. Nor do we consider whether a plan is good or one that we would have drawn. We consider only whether a plan violates the Voting Rights Act and the Constitution. These plans violate neither. We **DISMISS** the claims of racial gerrymandering filed by the Democratic

Conference plaintiffs for lack of standing; in the alternative, we **GRANT** judgment in favor of the State Defendants on the claims of racial gerrymandering filed by the Democratic Conference plaintiffs. We **DISMISS** as not justiciable the claim of vote dilution based on the local House delegation in Jefferson County; in the alternative, we **GRANT** judgment in favor of the State Defendants on the claim of vote dilution based on the local House delegation in Jefferson County. We **GRANT** judgment in favor of the State defendants on all remaining claims. A separate final judgment will follow.

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	)	CIVIL ACTION NO. 2:12cv691 (Three-Judge Court) (WO)
ALABAMA DEMOCRATIC CONFERENCE, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	)	CIVIL ACTION NO. 2:12cv1081 (Three-Judge Court) (WO)

THOMPSON, District Judge, dissenting.

In these two cases, the Alabama Legislative Black Caucus, various elected black officials, and others challenge the redistricting plans for the Alabama House and Senate. Specifically, they challenge each majority-black House and Senate District in addition to Senate Districts 7, 11 and 22. Despite the multiplicity of claims and responses in this litigation,

in my view the two cases are actually quite simple. As explained below, the drafters of these plans labored under the false belief that § 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c, required them to adopt for each majority-black district a particular percentage of black population, ranging as high as 78.1% black. Therefore, the drafters sifted residents by race across the State of Alabama in order to achieve for each such district, where possible, what I believe can only be characterized as naked "racial quotas." *Bush v. Vera,* 517 U.S. 952, 976 (1996) (plurality opinion) (approvingly quoting *Vera v. Richards,* 861 F. Supp. 1304, 1341 (S.D. Tex. 1994)) (internal quotation marks omitted).

I must reject Alabama's redistricting plans for essentially five reasons. First, Alabama's use of such a quota for any district warrants strict scrutiny. Second, the State's argument that its solution was required by § 5 is not supported by the correct interpretation of that statute. Third, in any event, because Alabama is no longer subject to preclearance under § 5, that statute cannot serve as the basis for the quotas. Fourth, the quota for each district in which it was used is not grounded in current political, social, racial conditions in that district that would warrant its use. Fifth, the State's redistricting plans "threaten[] to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno,* 509 U.S. 630, 657 (1993). "As a Nation

we share both the obligation and the aspiration of working toward this end." *Miller v. Johnson*, 515 U.S. 900, 927 (1995). I respectfully dissent.

I. BACKGROUND

I agree with the majority that the complaints in this matter are best construed as bringing three sets of claims: claims of vote dilution in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973; claims that the plans were drafted with invidious racial discrimination in violation of the Fourteenth and Fifteenth Amendments; and claims that the plans constitute a racial gerrymander in violation of the equal protection clause of the Fourteenth Amendment. As to the last, I would read both complaints as alleging that the plans in their entirety constitute racial gerrymanders and, as stated, also specifically challenging each majority-black House and Senate District in addition to Senate Districts 7, 11 and 22. Because I believe the plaintiffs are entitled to relief on their racial-gerrymandering claims and because that relief would require the drafting of new plans, I do not reach the other claims.

The majority opinion thoroughly recites the testimony and evidence presented in these consolidated cases. I will therefore summarize only the facts relevant to the racial-gerrymandering claims on which I would strike down these plans.

These cases arise out of Alabama's process for redistricting its state legislative maps following the

2010 census. Three men steered that process: Senator Gerald Dial, Representative Jim McClendon, and Randy Hinaman. Dial and McClendon were the co-chairs of the Permanent Legislative Committee on Reapportionment. Hinaman is a political consultant who drew the actual maps using specialized computer software called Maptitude under the supervision of Dial and McClendon.

The Reapportionment Committee adopted guidelines to govern the reapportionment process, setting forth a number of factors to consider in drafting the new maps. One key factor was compliance with § 5 of the VRA. *See* Tr. Vol. I at 54 (Dial testifying that "[t]rying to meet the voting rights requirements was the basis on which I drew those plan[s]"); *id.* at 113 (Dial's "first qualification" was "not regressing minority districts"); *id.* at 42 (Dial believed "our job was to get a plan . . . that would meet Justice"); Tr. Vol. III at 220-1 (McClendon's goal was Justice Department approval). Other factors included a newly adopted rule limiting the total population deviation among districts to 2%, preserving of the core of existing districts, avoiding conflicts between incumbents, ensuring compactness, and accommodating incumbent preferences.

Under § 5, a covered jurisdiction must seek preclearance of new redistricting plans from either the Attorney General of the United States or the United States District Court for the District of Columbia. Alabama was a covered jurisdiction until the Supreme Court's decision in *Shelby County v. Holder,*

133 S. Ct. 2612, decided after this case was filed but before trial.

Each of the drafters shared the same very specific (but incorrect) understanding of what compliance with § 5 involved: they believed they would need (1) to maintain the same number of majority-black districts as had existed under the 2001 redistricting scheme; and (2), more importantly for this case, to maintain, to the extent possible in each such district, the same percentage of black residents as that district was determined to have had when the 2010 census data were applied to the 2001 district lines. *See* Tr. Vol. III p. 142 (Hinaman explaining that "[w]hen I was adding population to majority black districts, my goal was not to retrogress the number that they had in 2001, meaning 2010 census, as applied to the 2001 lines"); Tr. Vol. I at 54 (Dial agreeing that his understanding of retrogression "required . . . that you maintain the black majority percentage" as measured by the 2001 districts with 2010 census data); Dial Dep., APX 66, at 81 (Dial stating that lowering the black population by even one percentage point would have been retrogression); Tr. Vol. III at 221 (McClendon stating that "we tried to look at the 2010 census, overlay it on the districts, and try not to change the percentages of the citizens, the black citizens"). The drafters acknowledged that this might not always be possible; but they believed § 5 required them to match the previous percentage of black population insofar as it was possible to do so.

This understanding meant that for each majority-black district, the drafters adopted a district-specific racial quota. For example, if the 2010 census data indicated that a particular district as drawn in 2001 was 75% black in 2010, then the drafters believed that § 5 required them to draw that district's new boundaries such that it remained 75% black.

These quotas, supposedly required by § 5, posed a challenge for the drafters. Many of the majority-black districts as drawn in 2001 were 'under-populated' once the 2010 census data were applied. 'Under-population' refers to a district which has fewer residents than is required by the constitutional principle of one-person-one-vote. *See Reynolds v. Sims,* 377 U.S. 533 (1964) (holding that equal protection requires that state legislative districts be roughly equal in population). This meant that if no changes were made to their boundaries those districts would have less population than the Constitution required.

In order to address the under-population of the majority-black districts, the drafters needed to add people, often many thousands of people. The drafters' quotas for those districts meant, in turn, that the large majority of those newcomers would need to be black. To illustrate, if 10,000 people needed to be added to the 75% black district discussed above in order to address its under-population, then per the drafters' understanding of retrogression under § 5 they would need to add at least 7,500 black people to maintain the same percentage of black residents overall. *See* Affidavit of Gerald Dial, APX 63, at 4

(" . . . we had to add population that was both contiguous to the old district line and had about the same percentage of black population in it"); Affidavit of Jim McClendon, APX 64, at 3 (same).

This problem was exacerbated by the rule the committee adopted mandating that the population of the least and most populated districts differ by no more than 2% of the ideal population.[1] The "ideal population" refers to the population each district would have if the State's total population were evenly divided among them. Prior to the current round of redistricting, the Alabama legislature had consistently used a 10% total deviation rule in drafting its state legislative redistricting plans. Because of the new 2% rule, under-populated districts needed to add even more population than they would have needed with a more traditional 10% deviation rule; often, the

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[1] The 2% rule is sometimes referred to in the record as the "plus or minus 1%" rule. This is slightly inaccurate, as a plan in which the largest district was 1.5% over-populated and the smallest was .5% underpopulated would still satisfy the committee's 2% rule, but would not be within plus or minus 1% of ideal population. See Arrington Report, NPX 323, at 30 n.5.

Throughout this litigation, the set of plaintiffs currently referred to as the "Alabama Democratic Conference plaintiffs" had been referred to as the "Newton plaintiffs." Demetrius Newton, formerly the lead plaintiff of that group, passed away shortly after trial in this matter, and the court has substituted Alabama Democratic Conference as lead plaintiff. I will continue to refer to exhibits submitted by the Alabama Democratic Conference plaintiffs as "NPX."

2% rule required thousands of additional residents.[2] And adding those thousands of additional residents meant, in turn, that the drafters would need to find many more black people to satisfy their quotas.

Indeed, the challenge the drafters created for themselves was enormous, as the sheer numbers show. The drafters' (incorrect) understanding of the requirements of § 5, in combination with their adoption of the 2% rule, meant that they needed to find over 120,000 additional black people to add to the majority-black House Districts.[3] [4] This amounted to

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[2] The majority appears to suggest that the 2% deviation rule was required by the one-person-one-vote principle, as applied in *Larios v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court), *aff'd by Cox v. Larios,* 542 U.S. 947 (2004). while I do not believe we must reach this issue, I feel obliged to set the record straight on this important question. Alabama's 2% rule is not constitutionally required; rather, it is well established that for state legislative redistricting any deviation up to 10% is presumptively constitutional. *Brown v. Thomson,* 462 U.S. 835, 852-53 (1983). therefore, the 2% rule is simply a state policy (not even a state statute or regulation) and must give way to the VRA when the two come into conflict. Thus, contrary to the majority's view, the State's 2% rule cannot restrict a § 2 plaintiff's ability to present an alternative map with a greater population deviation. "*Larios* in no way mandates that plaintiffs in a § 2 case bear a greater burden than simply presenting a plan with a population deviation under 10%." *Georgia State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs,* ___ F. Supp. 2d ___, 2013 WL 2948147 at *14 (N.D.Ga.2013) (Batten, J.).

[3] To calculate the additional black population the drafters needed to add to each majority-black House District in order to comply with their rules, the total additional population needed by each majority-black district was multiplied by the black

(Continued on following page)

19.7% of the black people in the State of Alabama who did not already live in a majority-black House District.[5] The story is similar in the Senate.[6] There, the drafters would need over 106,000 additional black people to satisfy their twin goals for the majority-black

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quota percentage used by the drafters for that district. The total additional population needed was calculated by subtracting the pre-reapportionment population, APX 6, from 99% of ideal population (45,065). Because some districts in this plan were 1% over-populated, 99% was used so that the total deviation would be no more than 2%. The total number of additional residents needed to comply with the 2% rule for each district was then multiplied by the quota percentage, which is the percentage of black population in each district before apportionment based on 2010 census data. APX 6. The resulting number of additional black individuals required for each district was rounded to the lowest integer. The sum of this calculation for each majority-black House District is 120,825 additional black people necessary across all districts to meet the requirements of the drafters' rules.

[4] Mr. Hinaman looked to total black population, not voting-age black population, in implementing his understanding of non-retrogression. Tr. Vol. III at 118. I do likewise throughout this opinion.

[5] According to the 2010 census, the total population of Alabama that identifies as any part black is 1,281,118. 2010 Demographic Profile Data, NPX 325. There were 669,134 black individuals living in majority-black House Districts at the time of the 2010 census. APX 6. This leaves 611,984 black people not yet living in a majority-black House District. The 120,825 additional black people needed to achieve the drafters' quotas represented 19.7% of those not already living in a majority-black district.

[6] Of course, there was likely overlap. The calculations for the House and Senate are independent, not cumulative.

districts.[7] This is 15.8% of the black population of Alabama not already living in a majority-black Senate District.[8]

But even those percentages understate the challenge the drafters faced. Many of the black people not already living in majority-black districts were likely dispersed around the State; but the drafters sought to find those additional 120,000 black people in areas contiguous to the existing majority-black House Districts. Affidavit of Gerald Dial, APX 63, at 4; Affidavit of Jim McClendon, APX 64, at 3. If a given majority-black district were surrounded by overwhelmingly black areas that were not already part of one of the majority-black districts, then this task might prove relatively easy. For example, if a majority-black district needed 10,000 additional residents, and 75% of those residents needed to be black to comply

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[7] The process for calculating this number is the same as described in note 3, *supra*. Ninety-nine percent of the ideal Senate District is 135,198 people. The population and black percentage figures for the Senate were drawn from APX 7. The sum of this calculation for all the majority-black Senate Districts is 106,946 additional black people.

[8] *See* note 5, *supra*. The total population of Alabama that identifies as any part black is 1,281,118. 2010 Demographic Profile Data, NPX 325. There were 603,978 black individuals living in majority-black Senate Districts at the time of the 2010 census. APX 7. This leaves 677,140 black people not yet living in a majority-black Senate District. Thus the 106,946 additional black people needed to achieve the drafters quotas, *see* note 7, *supra*, represented 15.8% of those not already living in a majority-black district.

with the drafters' quota, then adding a nearby neighborhood containing 10,000 people of whom 75% were black would fit the bill. But if the available areas near a majority-black district were racially diverse, or even predominantly white, then a more artful approach would be required to add the requisite population without lowering the percentage of black residents. Thus, for example, if the 75% black district were surrounded by areas in which only 50% of the population was black, then the drafters would need to find some method of sorting the black people from the white in order to add population that was 75% black. They would not be able to add population en masse, but would need to finely craft lines in order to include enough black residents and exclude enough white ones.

With this view of the challenges he faced, Hinaman set to work drafting these plans. Underscoring the focus on compliance with the drafters' understanding of § 5, he began his work by drawing the majority-black districts. The maps Hinaman drew contain 27 majority-black House Districts ("HD") and eight majority-black Senate Districts ("SD"); this is the same number as existed under the 2001 plan.[9]

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[9] There is one additional district, HD 85, that is majority black under the new plan in terms of total black population. APX 6. HD 85 was 48.37% total black population under the 2001 plan with 2010 census; it has a bare majority of total black population under the new plan. *Id.* However, it remains only plurality black in terms of voting-age population. *Id.*

However, the districts are not all drawn in the same place. Faced with under-population in the majority-black districts, Hinaman concluded that he could not draw the same number of majority-black districts in Jefferson County without lowering the percentages of black population in those districts. *See* Hinaman Dep., APX 75, at 60 (the alternative to moving HD 53 was to "retrogress every one of those districts by adding in adjoining white areas"). That outcome was unacceptable; Hinaman, like the other drafters, believed that § 5 required him to meet the quota of the previous percentage of black population. Hinaman never actually tried to draw nine majority-black districts in Jefferson County, and so could not say how much lower the black percentages would have been; in fact, he believed it *would* have been possible to draw nine such majority-black districts. *Id.* at 60-61, 86. Instead of doing so, he concluded that the prospect of lower black percentages in the majority-black House Districts left him no choice: he had to eliminate one of the districts, HD 53, from Jefferson County, relocate it elsewhere, and use its black population to maintain the black percentages in the remaining Jefferson County districts.

Hinaman took similar action in Montgomery County. There, he was again confronted with under-population in the majority-black districts. This time, his approach was to eliminate HD 73, a plurality-black district, and use its substantial black voter population to maintain the level of black population in the majority-black districts. As McClendon put it,

"The minority districts in Montgomery were underpopulated" and so "[w]e needed to pick up minorities from somewhere." McClendon Dep., APX 67, at 90. In other words, the previous HD 73, like the previous HD 53, was eliminated in order to satisfy the drafters' *racial quotas for* the surrounding majority-black districts.[10]

Eliminating two districts and redrawing them in another part of the State created conflicts between incumbents. Under the new plan, the incumbents of HD 53, Demetrius Newton, and HD 73, Joe Hubbard, were left living in another legislator's district.[11] One of the drafters' goals was to avoid such conflicts among incumbents. But as the elimination of these two districts demonstrates, the drafters' priority of meeting the racial quotas for majority-black districts trumped the goal of incumbent protection. As Hinaman testified when he was asked about separating incumbents: "Well, it was a goal. It was a nice goal. Didn't always work out." Tr. Vol. III at 161.

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[10] The majority refers to HD 73 as a majority-white district. That was true at the time of the 2001 reapportionment. With 2010 census data, HD 73 was 48.44% black and 44.07% white. Population Summary Report, SDX 406, at 6.

[11] As the majority notes, Newton has since passed away, and Hubbard has moved. Obviously the drafters were not aware of these circumstances at the time; thus these unforeseen later events do not bear on the question of whether race predominated over incumbency protection.

Hinaman took such dramatic steps to achieve the racial quotas, which he believed § 5 required, throughout the State. One glaring example is SD 26. That district, represented by Senator Quinton Ross, was under-populated by nearly 16,000 people from the ideal population. With the 2010 census data, his district was already 72.75% black. At trial, Ross noted that if only white people had been added to repopulate his district, it still would have been about 64% black; Ross testified he would have been comfortable with an even lower percentage of black residents.[12] Instead, the Senate plan added 15,785 people to his district, of whom only 36 were white; 14,806 were black. That is, just .2% of the net population addition to SD 26 was white; as the Alabama Democratic Conference plaintiffs note, "This compares unfavorably to the 1.00 percent of the black voters who were left in the City of Tuskeegee after the racial gerrymander in *Gomillion v. Lightfoot,* 364 U.S. 339 (1960)." ADC Pfs. Proposed Findings of Fact and Conclusions of Law (Doc. No. 195-1), at 64. Ross testified that, given the demographics of the area, to locate so many black people and so few white people near his district, "You have to make sure you look hard to find them." Tr. Vol. II at 128.

Hinaman indeed went out of his way to locate so many black people in the vicinity of SD 26 and to exclude white people from the district. Ross testified

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[12] If every additional resident of SD 26 under the new plan had been white, it would be 64.3% black. APX 7.

that the population in the current SD 26 is highly segregated and that the boundaries in the new plan track those racial lines. Ross stated that, despite the under-population of his district, the new plan actually split precincts that were already part of SD 26, moving white portions of those precincts out of his district while retaining only the black portions; in other words, despite needing a huge number of new residents, Hinaman *removed* white residents already living in SD 26. This followed the pattern of the precinct splits between Ross' district and white-majority SD 25, which gave the black-majority portions of precincts to SD 26 and the white-majority portions to SD 25. The new SD 26 wraps around and excludes a portion of Montgomery which Ross testified is predominantly white, and the resulting district is not compact. *See* Map, SDX 476, State Demonstrative Exhibit Tab 6. By taking these various steps to remove white residents and add black ones, the drafters achieved and even exceeded their quota of 72.75% black for this district; in the new plan, SD 26 is over 75% black.

Hinaman followed a similar pattern of 'looking hard' for black people throughout the State in order to achieve the quotas. Precinct splits like those Ross described were a major characteristic of these plans. One of the plaintiffs' expert witnesses, William Cooper, testified that there was "massive precinct

splitting" statewide. Tr. Vol. II at 105.[13] Indeed, about 25% of all precincts were split, and dozens of precincts were split among two, three, or four different districts. *Id.*

Furthermore, Hinaman split those precincts largely along racial lines. *See* Arrington Report, Ex. 323, at 37 (noting the precinct splits "mainly divided heavily minority blocks from heavily white ones"); Hinaman Dep., APX 75, at 117-8 (stating that avoiding retrogression and creating majority-black districts were two of his three normal reasons to split precincts). Indeed, Hinaman acknowledged that he used precinct splits in hunting for black residents. He agreed that, to avoid retrogression, he would first "reach out to find black precincts." Tr. Vol. III p. 141-2. But, he testified, when adding whole precincts lowered the percentage of black residents in the new district, he would split precincts to achieve the racial quotas. *Id.* at 143.

In fact, the evidence establishes that Hinaman principally relied on the race of individuals living in split precincts in deciding how to distribute them among districts. As I will explain, this is clear because in deciding how to split precincts, Hinaman had access to the racial makeup of mapping units smaller than precincts; but he had no accurate data

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[13] Plaintiffs submitted a map illustrating the precinct splits statewide. *See* Map, NPX 357. There was no testimony to further explain this map.

about the political makeup of those sub-precinct units. Thus, the fact that Hinaman's precinct splits track race cannot be explained by race correlating with party affiliation, for example. For in choosing which residents of split precincts would be in majority-black districts and which would not, Hinaman knew those residents' race but not their political affiliation or voting history.

Precincts are the basic unit of elections; in each precinct, voters cast their votes at a specified location. Precincts in turn are made up of census blocks, which are the smallest geographic unit the United States Census Bureau uses for statistics from its decennial population survey.

At the precinct level, there are "political" data: for example, what candidates won and lost in that precinct in past elections, and by how many votes. This can show the partisan breakdown of the population of a precinct. But because of the secret ballot, no political data are available at the block level. Cooper, who has 25 years of experience drawing redistricting maps, explained that there were no accurate political data at that level because "you don't really know where . . individuals who turned out to vote for X or Y candidate actually live" within a precinct. Tr. Vol. II at 104.[14]

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[14] Hinamar testified that the only block-level political data he had available were generated by Maptitude on a strictly proportional basis from the precinct political data. That is, if a

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By contrast, because demographic data are collected by the Census Bureau on a house-by-house basis and aggregated at the census block level, accurate racial data are available for particular census blocks. Another of plaintiffs' experts, Theodore Arrington, noted that the census file from which Hinaman was working was "rich in racial data." Arrington Report, NPX 323, at 37. Hinaman acknowledged that "when I was working on the [m]ajority black districts I had the racial data." Hinaman Dep., APX 75, at 112.

When Hinaman split precincts, as he did in SD 26, he relied on those racial data. He could not have done so based on political data, because none were available at the census block level. The only reasonable conclusion is that he split precincts based on the information that was available: namely, demographic data reflecting the race of the individuals who lived in each census block. And the evidence establishes that the reliance on racial data at the census block level was common statewide: as Cooper observed, because so many precincts were split, "[c]learly there was a focus on census blocks." Tr. Vol. II at 106. In other words, clearly there was a focus on race.

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precinct voted 60% Republican in the last election, Maptitude indicates that each census block in that precinct voted 60% Republican in the last election. But of course in reality 100% of any particular census block might have voted for the Republican, or 0%, or anywhere in between. Hinaman acknowledged that these data were not accurate. Hinaman Dep., APX 75, at 113-4.

The drafters' belief that § 5 required a particular quota for each majority-black district also meant that they would reject suggestions from legislators when suggested changes failed to achieve those quotas. For example, Senator Marc Keahey (SD 22) testified at *trial* that he submitted to Dial close to ten proposed maps for his district, to each of which the incumbents of the neighboring black-majority SD 23 and SD 24 had agreed. Dial had told Keahey that he would consider such proposals with the other senators' support as long as they did not cause retrogression in majority-black districts; Keahey understood his proposals to meet that requirement. However Dial rejected all of Keahey's proposals as retrogressive. Eventually, Keahey came to understand the source of the disagreement. Keahey had sought to match the previous percentage of black residents in those districts using the *2000 census data*, because that is what he thought Dial required. But Dial's understanding of § 5 meant that the new districts needed to match the percentage of black population in the 2001 districts with the *2010 census data*. That is, in Dial's view Keahey had used *the wrong quota*; because Keahey's proposals did not achieve the correct quota, the drafters would not even consider them, despite the preferences of all the affected incumbents.

Keahey's testimony demonstrates that Dial's adherence to particular quotas was strikingly rigid. For example, one of the majority-black districts that borders Keahey's district is SD 23, represented by Senator Sanders. Using the 2000 census data, as

Keahey originally did, SD 23 was 62.31% black. 2001 Plan Statistics, APX 4, at 5. But using Dial's actual standard, namely the 2001 districts with 2010 census data, SD 23 was 64.79% black. APX 7. Thus if Keahey offered a suggested change, to which Senator Sanders had agreed, that maintained 62.31% black population in SD 23 but did not achieve 64.79% black population, Dial would automatically reject such a change as "retrogressive."[15] Indeed, Dial agreed that he rejected Keahey's proposals on just this basis. He testified that according to his understanding of § 5, a drop of even one percentage point would be retrogressive. Dial Dep., APX 66, at 81. The use of a rigid quota could not be clearer.

In sum, then, the drafters believed that § 5 required them to sift through surrounding districts for black people in order to achieve particular racial quotas for each district. In seeking to meet those quotas, they eliminated existing districts, created conflicts between incumbents, ignored legislators' preferences, and split a huge volume of precincts.

The drafters were quite successful in achieving their quotas. *See* Comparisons of 2001 and 2012 plans with 2010 census data, APX 6 & APX 7. Of the majority-black districts, the black percentage of the population

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[15] The margin between Keahey's and Dial's interpretation was even narrower for the other nearby majority-black district that Keahey discussed. Using the 2000 census data, as Keahey did, SD 24 was 62.41% black. APX 4 at 5. Using the 2010 census data, as Dial required, that district was 62.68% black. APX 7.

in 13 House Districts[16] and three Senate Districts[17] is within one percentage point of the goal of maintaining the same percentage of black residents even after repopulating the districts, often with thousands of new individuals. Seven House Districts[18] and three Senate Districts[19] have an even higher percentage of black population than before.

In some districts, the rigidity of these quotas is on full display.[20] HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came *within two individuals* of achieving the exact quota they set for the black population, out of a total population of 45,083; those two people represent .004% of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071. In the Senate, SD 23 contains 116 more black

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[16] HD 32 (+.68%); HD 52 (+.01%); HD 53 (+.49%) (transplanted to Madison County); HD 54 (+.13%); HD 55 (+.06%); HD 56 (+.04%); HD 57 (+.01%); HD 60 (+.27%); HD 67 (+.06%); HD 69 (+.09%); HD 70 (+.31%); HD 83 (+.67%); and HD 97 (+.07%).

[17] SD 18 (-.81%); SD 23 (+.02%); and SD 24 (+.48%).

[18] HD 59 (+9.76%); HD 68 (+2.1%); HD 71 (+2.62%); HD 72 (+4.38%); HD 76 (+4.34%); HD 82 (+5.02%); and HD 84 (+1.73%).

[19] SD 26 (+2.47%); SD 28 (+8.91%); SD 33 (+6.82%).

[20] For the calculations underlying the figures in this paragraph, *see* notes 3 & 7, *supra*; APX 6 & 7.

individuals than were needed to achieve the drafters' quota of adding an additional 15,069 black people, out of a total population of 135,338; in other words, the difference between the quota and the additional black population in the ultimate plan represents .086% of the district.

The plans were enacted over the opposition of every black legislator in the State, and precleared by the Justice Department. Two sets of plaintiffs, including the Alabama Legislative Black Caucus, the Alabama Democratic Conference, and a number of individuals, brought these lawsuits challenging their legality.

II. DISCUSSION

The majority rejects the plaintiffs' racial-gerrymandering claims on two bases: first, that race was not the predominant factor in drawing these plans; and, second, that even if strict scrutiny applies, the maps were narrowly tailored to achieve the compelling purpose of compliance with § 5 of the VRA. I disagree on both points.[21] I will first review the

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[21] The majority finds that the plaintiff Alabama Legislative Black Caucus has standing to challenge these plans as racial gerrymanders, and I agree. I understand the Caucus to challenge each individual majority-black district in addition to the plans in their entirety, and find that it has standing to do so as well. I would also find three individual plaintiffs have standing to bring racial gerrymandering claims. Bobby Singleton is the Senator for majority-black SD 24, and so has standing for the

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standard for a racial-gerrymandering claim, and will then address the majority's conclusions in turn.

A. Legal Standard

The Fourteenth Amendment's equal protection clause provides that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. The central purpose of the clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno,* 509 U.S. 630, 642 (1993). "'[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 730 (2007) (plurality opinion of Roberts, C.J.) (quoting *Miller v. Johnson,* 515 U.S. 900, 911 (1995)) (internal citation omitted); *see also Fisher v. Univ. of Texas at Austin,*

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reasons stated in the majority opinion. In addition, Alabama Democratic Conference plaintiffs Lynn Pettway and Stacey Stallworth have standing to challenge the abolition and movement of HD 73. The stipulations and trial testimony establish that both are residents of current HD 73. The plaintiffs claim that the drafters racially gerrymandered HD 73 out of existence. Thus, whichever surrounding district these plaintiffs ended up in under the new House plan, they claim that they were placed there predominantly because of race. This is sufficient for standing under *United States v. Hays,* 515 U.S. 737, 744-5 (1995).

133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) ("The Constitution abhors classifications based on race because every time the government places citizens on racial registers . . . it demeans us all") (internal quotation marks omitted).

In *Shaw v. Reno,* the Supreme Court recognized a claim under the equal protection clause that was "analytically distinct" from somewhat similar vote-dilution claims. 509 U.S. at 652. Where a purposeful-dilution claim alleges that a redistricting plan was enacted with the purpose of "minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities," *Mobile v. Bolden,* 446 U.S. 55, 66, "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Miller,* 515 U.S. at 911. If race is so used, then the redistricting plan is subject to strict scrutiny.

Redistricting legislation generally does not explicitly refer to race; rather, it "classifies tracts of land, precincts, or census blocks, and is race neutral on its face." *Hunt v. Cromartie,* 526 U.S. 541, 547 (1999). In addition, the Supreme Court has consistently recognized that redistricting is a complex process, and that legislatures will nearly always be "aware" of racial demographics. *Miller,* 515 U.S. at 916. Such awareness of race is never enough to trigger strict scrutiny.

Instead, the Court has required that a *Shaw* plaintiff show "that race was the predominant factor

motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller,* 515 U.S. at 916. More specifically, a plaintiff must establish that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

The plaintiff in such a case may carry this burden in a number of ways. In some instances, circumstantial evidence, including the shape of the district and the demographic splits created by its borders, is sufficient to establish that the boundaries are "unexplainable on grounds other than race." *Hunt,* 526 U.S. at 546 (citing *Shaw,* 509 U.S. 630). In other cases, there is direct evidence that race was the predominant factor in the legislature's decision-making. *See, e.g., Miller,* 515 U.S. at 917-8. But, in any event, the rule is clear: if race was the predominant factor, strict scrutiny applies.

To survive strict scrutiny, a racial classification must be narrowly tailored to achieve a compelling state interest. *Id.* at 904. While such scrutiny is not "strict in theory, but fatal in fact," *Johnson v. California,* 543 U.S. 499, 514 (2005) (internal quotation marks omitted), the State is required to establish the "most exact connection between justification and classification." *Parents Involved,* 551 U.S. at 720 (majority opinion of Roberts, C.J.) (quotation marks omitted).

B. Race Predominated

Race was the predominant factor in the drafters' decisions to draw the majority-black districts as they did.[22] This is clear from an examination of the racial quotas they adopted, even standing alone. Such quotas, under the circumstances of this case and without any justification other than race, require the court to strike down this plan unless the State can satisfy strict scrutiny. Furthermore, although no additional evidence is necessary in this case, there is ample circumstantial evidence that various other districting factors were subordinated to race in the drafting of those majority-black districts. The majority's arguments to the contrary are unpersuasive; strict scrutiny must apply.

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[22] I believe that the standard articulated in *Miller*, namely that a plaintiff must show that race was the predominant factor motivating a districting decision, is appropriate in cases like *Shaw* and *Miller*. But this is a different case. Here, black legislators and black voters are challenging the State's decision to place them in majority-black districts. Whether that same predominant-factor standard should apply in a case like this one, where the class of individuals seeking protection from a racial classification are members of a group historically and currently subject to invidious racial discrimination, is a serious open question. It may be that under these circumstances, the principles of general Fourteenth Amendment jurisprudence should control such a case. However, because the plaintiffs in this case are entitled to relief even under a predominant-factor analysis, I will assume for the purposes of this dissent that the *Miller* analysis is applicable to this case.

i.

From start to finish, Hinaman, Dial and McClendon were focused on drafting majority-black districts that would be precleared under § 5 of the VRA. *See* Tr. Vol. I at 113 (Dial's "first qualification" was "not regressing minority districts"); Tr. Vol. III at 220-1 (McClendon's goal was Justice Department approval); Tr. Vol. III at 145 (Hinaman "was concerned about . . retrogression that would be looked upon unfavorably by the Justice Department under Section 5").

They believed that § 5's non-retrogression principle required them to maintain (as nearly as possible) the same percentage of black residents in any given majority-black district as that district had when the 2010 census data was applied to the 2001 district boundaries. *See* Tr. Vol. I at 54 (Dial agreeing that his understanding of retrogression "required . . . that you maintain the black majority percentage" as measured by the 2001 districts with 2010 census data); Tr. Vol. III at 221 (McClendon stating that "we tried to look at the 2010 census, overlay it on the districts, and try not to change the percentages of the citizens, the black citizens"); Tr. Vol. III p. 145 (Hinaman, when asked to define retrogression, stating that he would look to "2010 census as applied to 2001 lines" and then "tried to be as close to that as possible").

The direct evidence of the drafters' goals and intentions comes straight from their lips. Dial, for

example, had the following exchange at his deposition:

> "Q. So you did not want the total population of African-Americans to drop in [SD 23]?
>
> "A. That's correct.
>
> "Q. Okay. And if that population dropped a percentage, in your opinion that would have been retrogression?
>
> "A. Yes, sir.
>
> "Q. So if – And I'm not saying these are the numbers, but I'm just saying if Senator Sanders' district had been 65 percent African-American, if it dropped to 62 percent African-American in total population, then that would have been retrogression to you?
>
> "A. In my opinion, yes.
>
> "Q. And so that's what you were trying to prevent?
>
> "A. Yes."

Dial Dep., APX 66, at 81. By their own candid admissions, the drafters acknowledged that they understood § 5 to mean that for each majority-black district they needed to achieve a set percentage of black population, defined by the percentage in that district as drawn in 2001 with the 2010 census data.

This kind of requirement has a name: racial quota. "Quotas impose a fixed number or percentage which must be attained." *Grutter v. Bollinger,* 539

U.S. 306, 335 (2003) (internal quotation marks omitted). The Supreme Court's equal protection cases have time and again treated this type of "rigid racial quota," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), with the highest skepticism. *See id.*; *Grutter*, 539 U.S. at 335; *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978) (Opinion of Powell, J.).

The drafters did not deny adopting such percentages or quotas. To the contrary, when confronted with the suggestion that partisan politics, rather than race, actually motivated the how the majority-black districts were drawn, the drafters vehemently denied it. When asked about the use of partisan data at his deposition, Dial explained:

> " . . . what I did was begin with the minority districts to ensure they were not regressed, and each one of them had to grow. And as we did those, then I filled in the blanks around those with what was left of the districts. So I didn't look at partisan to say how many Republicans are here or how many Democrats are here. I began my process by filling in the minority districts, not to do away with any of those and not to regress any of those. And as they grew, we made sure that they grew in the same proportion [of black residents] that they had or as close to it as possible. And what was left, we just – it was basically fill in the blanks with what was left."

Dial Dep., APX 66, at 19-20. When asked at trial, "Weren't you aware when you were drawing the

[S]enate [D]istricts that the Republicans' goal in this state was to maintain your super majorities in the Legislature?," Dial denied that was his goal:

> " . . . I established my goal as maintaining the minority districts and passing a plan that would meet Justice Department. That was my ultimate goal, and that's what I worked for . . . The numbers themselves were actually to insure that we did not regress the minority districts, and we filled in what was left."

Tr. Vol. 1 at 61. In this case, time and again the drafters have emphasized that in drawing the majority-black districts they were motivated by a desire to obtain preclearance. And time and again they have articulated their understanding that § 5 meant they needed to achieve racial quotas.

ii.

These percentages or quotas in the State's legislative plans must fall of their own weight unless they can survive strict scrutiny. *Bush v. Vera,* the Supreme Court's first effort to apply the *Miller* predominant-factor standard to a legislative plan in which many of the districts were being challenged, is particularly instructive. At first blush, it might appear that *Vera* is of little precedential value because the decision is so fractured, with a plurality opinion, three concurrences, and two dissents. However, the array of opinions is helpful for two reasons: First, they offer a nuanced view of how the Justices think the *Miller*

predominant-factor standard should be applied. Second, and perhaps most importantly here, under all of the opinions, the quotas in Alabama's legislative redistricting plans would fail unless they can survive strict scrutiny. Or, to put it another way, no matter how one defines the *Miller* predominant-factor standard, the quotas warrant strict scrutiny.

First, there is the *Vera* plurality opinion. The opinion first acknowledged that it was confronted with an array of factors that went into a legislative redistricting plan. The opinion therefore explained that, "Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained." *Vera*, 517 U.S. at 965. Similarly here, because it is contended that race was not the only factor that motivated the Alabama Legislature to draw the challenged district lines the way it did, we must scrutinize each challenged district individually to determine whether race predominated over legitimate districting considerations.

For each district, the critical question is whether race was "the predominant factor motivating the legislature's [redistricting] decision" for that district. *Id.* at 959 (emphasis and internal quotation marks omitted). In this case, we are confronted with districts in which (1) the drafters announced a racial percentage or quota; (2) the drafters achieved that

quota; and (3) there is no explanation for those actions other than race. For example, it is clear that one factor and one factor alone explains the fact that SD 26 is over 75% black: race. Nothing else explains that percentage. And the same is true for SD 24. One factor and one factor alone explains the fact that SD 24, with a quota of 62.8% black, is 63.3% black: race. And the same is true for SD 23. One factor and one factor alone explains the fact that SD 23, with a quota of 64.79% black, is 64.81% black: race.

Also, the same is true for majority-black House Districts. One factor and one factor alone explains the fact that HD 55, with a quota of 73.54% black, is 73.6% black: race. One factor and one factor alone explains the fact that HD 67, with a quota of 69.14% black, is 69.2% black: race. One factor and one factor alone explains the fact that HD 57, with a quota of 68.49% black, is 68.5% black: race.

The State has not offered, and on this record cannot offer, any alternative explanation that would *explain away* the State's apparent use of race. In *Vera,* the State had argued that incumbency protection, rather than race, had motivated what appeared to be racial gerrymandering. Because the State had pointed to a race-neutral factor that might *correlate* to race, the plurality found it necessary to examine each district closely to determine whether that race-neutral factor explained the apparently racial lines the State had drawn *better* than race did. But here the State has offered *no* race neutral explanation for the black percentages in the majority-black districts;

no race-neutral explanation for why SD 26, for example, is 75% black. In fact, Dial explicitly rejected the idea that partisan politics, rather than the racial quotas, motivated the drawing of the majority-black districts. In the absence of such an explanation, the plurality in *Vera* would have no difficulty striking down districts like those presented in this case, namely districts drawn to achieve racial quotas.

Second, there is Justice O'Connor's concurring opinion. While she wrote separately to explain why "compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest" and why "that test can coexist in principle and in practice with *Shaw*," *Vera*, 517 U.S. at 990 (O'Conner, J., concurring), she accepted the plurality opinion's understanding of the *Miller* predominant-factor standard; this, of course, is unremarkable, since she wrote the plurality opinion as well. Therefore, for the same reason that Alabama's quotas warrant strict scrutiny under the plurality opinion, they warrant the same under Justice O'Connor's concurrence.

Third is Justice Kennedy's concurrence. While he joined the plurality opinion, he expressly and unequivocally stated in his discussion of the *Miller* predominant-factor standard that, "In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races." *Id.* at 996 (Kennedy, J., concurring). Similarly, because Alabama has decreed that SD 26 must be 72% black, no matter

what the other demographics are, and because it drew SD 26 so as to make it 75% black, it would be difficult, if not impossible to explain to Justice Kennedy why SD 26 would not be subject to strict scrutiny. And the same would apply to SD 23's 64% quota, SD 24's 62% quota, and so forth. And the same would apply to HD 55's 73% quota, HD 57's 68% quota, and so forth.

Fourth, there is Justice Thomas's concurrence, in which Justice Scalia joined. Justice Thomas stated that "Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was *a predominant,* motivating factor in its redistricting." *Id.* at 1000 (Thomas, J., concurring in the judgment) (emphasis added). He further stated that, "Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting." *Id.* One does not need to think long to know what Justice Thomas's views on Alabama's quotas would be.

Fifth and finally, four Justices in *Vera* dissented and concluded that the challenged legislative plan did not warrant strict scrutiny. Though the majority in this case reaches a similar result about the Alabama plan, I do not think the majority can take solace from the reasoning of the *Vera* dissenters. Justice Stevens wrote a dissent in which Justices Ginsburg and Breyer joined; Justice Souter wrote a separate dissent, but stated that he agreed with Justice Stevens's application of the *Miller* predominant-factor

standard. For this reason, I will discuss only Justice Stevens' opinion. Justice Stevens stated that "the typically fatal skepticism that we have used to strike down the most pernicious forms of state behavior" need not apply only if three conditions are met: "the state action (i) has neither the intent nor effect of harming any particular group, (ii) is not designed to give effect to irrational prejudices held by its citizens but to break them down, and (iii) uses race as a classification because race is relevant to the benign goal of the classification." *Id.* at 1010 (Stevens, J., dissenting) (quotation marks omitted). There is absolutely nothing in the record to support the conclusion that these conditions are present as to Alabama's redistricting plans. Indeed, it appears that the only racial dynamic at play in Alabama's plans is that white members of the Alabama legislature, and the white ones alone, have expressly and specifically targeted black legislators and the members of their districts for difference in treatment solely because of the race of those legislators and over those black legislators' deep and vocal objections.

This aspect of this case, in particular, bears a disturbing similarity to *Gomillion,* 364 U.S. 339, where the Supreme Court condemned the redrawing of Tuskegee, Alabama's municipal boundaries by white members of the Alabama Legislature so as to exclude almost all the black citizens of that community. Admittedly, the there are some fundamental differences between this case and *Gomillion*: This case is based on the Fourteenth Amendment, and

Gomillion was based principally on the Fifteenth Amendment, although it has also been read as a Fourteenth Amendment case, *see Shaw,* 509 U.S. at 645; this case involves a *Shaw* claim, whereas *Gomillion* involved an invidious discrimination claim, although again *Shaw* itself drew on *Gomillion*; and, in this case, blacks are being brought into or kept in a district solely because of their race, and, in *Gomillion,* blacks were being excluded from a district solely because of their race. Nevertheless, in both cases, white members of the Alabama legislature, and the white ones alone, expressly and specifically targeted black people and treated them differently in the drawing of district lines solely because of their race. And despite the fact these black people object to, and are even offended, by this racial targeting and treatment, they are powerless to do anything about it politically. Or, to put it another way, a white majority has unwelcomely imposed its will on how a black minority is to be treated politically.

The injustice of this was poignantly brought home in the testimony of Senator Vivian Figures, an African-American, at the trial of this case. Senator Figures acknowledged at trial that the Republican Party had won a supermajority in the 2010 elections "fair and square." Tr. Vol. II at 51. She therefore "expected to be outvoted" as a Democrat. *Id.* But what she did not expect was for her "voice to be squashed." *Id.* This voicelessness, this complete powerlessness to do anything about the fact that white members of the Alabama legislature expressly and specifically

targeted her and treated her differently in the drawing of her district lines solely because she is black, belies the idea that these plans could be considered "benign" under Justice Stevens's analysis. In this sense, Senator Figures's plight today is no different from that of Dr. Gomillion. Like Dr. Gomillion, she has no means to be heard and no avenue for relief-except through this court. In light of these considerations, it is clear that, under Justice Stevens' opinion in Vera, Alabama's plans are not saved from the court's "typically fatal skepticism." *Id.*

Thus, under any of the analyses articulated in *Vera,* the racial quotas here, supposedly required by § 5, were the predominant factor motivating how the majority-black districts were drawn. Under any of those analyses, this plan is subject to strict scrutiny. For the plurality, strict scrutiny is required because the drafters adopted racial quotas, achieved those quotas, and there was no other factor to explain why they added so many black people to the majority-black districts. For Justices Kennedy, Thomas, and Scalia, the adoption of a racial quota is enough standing alone. And for Justice Stevens and the other dissenters, the factors which would allow for an exception to the rule of strict scrutiny for racial classifications are simply not present in this case. Under the analyses announced in each of the opinions in *Vera,* the use of quotas in this case cannot stand unless they survive strict scrutiny.

iii.

This conclusion that the strictest scrutiny should apply in this case because of the use of racial quotas is reinforced by an examination of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) ("*UJO*"). *UJO* was a predecessor to the *Shaw* line of cases. In *UJO*, a "highly fractured" majority, *Shaw*, 509 U.S. at 651, upheld New York's reapportionment plan against a constitutional challenge. The Court, first in *Shaw* and later in *Miller*, read the *UJO* majority to have decided the case on a vote-dilution theory, rather than a racial-gerrymandering theory. The Court was clear in *Miller*: "To the extent any of the opinions in [*UJO*] can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not be deemed controlling." *Miller*, 515 U.S. at 915. Thus the fractured *UJO* majority's views are not relevant to this case, as the Court has since read them as either inapposite or overruled.

Nonetheless, the *UJO* dissent is instructive. Of all the opinions in the case, only Chief Justice Burger's dissent applied the kind of equal protection analysis eventually adopted by the Court in *Shaw*, namely one focused on the sorting of voters by their race. Therefore, while dissents ordinarily carry little authority, the dissent in *UJO* is different: it persuasively applied the analysis which the Court subsequently adopted as the law of the land in *Shaw* and *Miller* to a set of facts similar to those in the instant case.

Thus, the *UJO* dissent carries substantial persuasive authority.

Chief Justice Burger perceived grave problems with New York's plan, which mandated a particular minority population percentage, 65%, for majority-minority districts. The State believed that percentage was required by the VRA based on a comment from a Justice Department official. *UJO,* 430 U.S. at 181-2 (Burger, C.J., dissenting). Chief Justice Burger concluded that the State had "mechanically adhered" to the 65% figure, even rejecting an alternative that would have reduced the minority percentage by a mere 1.6%. *Id.* at 183. The Chief Justice rejected this approach as unconstitutional: "Although reference to racial composition of a political unit may, under certain circumstances, serve as a starting point . . . rigid adherence to quotas" like the one at issue in *UJO* violates the Constitution. *Id.* at 185-6 (internal quotation marks omitted).

The drafters in this case took essentially the same approach as the State in *UJO.* Apparently believing that § 5 required their actions, the drafters adopted particular minority percentages for each majority-black district, and mechanically adhered to those figures whenever it was possible to do so. In *UJO,* the figure was 65% across the board, while in this case each majority-black district had its own figure, based on the black population at the time of reapportionment. But the result is the same in either case under *Shaw*: when redistricting is driven by

"rigid adherence to quotas," *id.* at 186, strict scrutiny applies.

iv.

The majority states that the drafters' need to pursue certain racial percentages for the majority-black districts was not a "bright-line rule" and that it gave way where "necessary to achieve other objectives." *Ante* at 132.

I am not quite sure what the majority means by saying that there was no bright-line rule. If the majority means that significance should be drawn from the fact that the drafters did not succeed in securing the sought-after percentage of black residents in each and every majority-black district, I have no qualm in noting that significance. Perhaps, for those districts where the drafters fell short, factors other than race can explain resulting percentages, and I am willing to engage the majority in a determination of whether the plaintiffs should prevail as to *those* districts. With this dissent, I am not saying that the plaintiffs should prevail as to all the districts. What I am saying is two things: First, there must be an individual assessment for each district as whether race was a predominant factor. *See Miller,* 515 U.S. at 916 (question is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"). Second, the fact that the drafters failed to achieve their sought-after

percentage in one district does not detract one iota from the fact that they did achieve it in another. The racial quota, and nothing else, explains why SD 26 is 75% black. And the same is true for the fact that SD 24 and SD 23 are 63% and 64% black, respectively, and that HD 55 and HD 67 are 73% and 69% black, respectively, and so on. If the drafters relied on a racial quota in drawing *even one* district, that decision is subject to strict scrutiny.

In any event, what is most striking is the extent to which the drafters did succeed in matching the black percentage of the majority-black districts: the black percentage of the population in 13 House Districts[23] and three Senate Districts[24] is within one percentage point of the stated goal; in other words, the drafters effectively hit their quotas in those districts. Seven House Districts[25] and three Senate Districts[26] have an even higher percentage of black residents than under the old plan.[27] Overall, the drafters either

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[23] HD 32 (+.68%); HD 52 (+.01%); HD 53 (+.49%) (transplanted to Madison County); HD 54 (+.13%); HD 55 (+.06%); HD 56 (+.04%); HD 57 (+.01%); HD 60 (+.27%); HD 67 (+ .06%); HD 69 (+.09%); HD 70 (+.31%); HD 83 (+.67%); HD 97 (+.07%).

[24] SD 18 (-.81%); SD 23 (+.02%); SD 24 (+.48%).

[25] HD 59 (+9.76%); HD 68 (+2.1%); HD 71 (+2.62%); HD 72 (+4.38%); HD 76 (+4.34%); HD 82 (+5.02%); HD 84 (+1.73%).

[26] SD 26 (+2.47%); SD 28 (+8.91%); SD 33 (+6.82%).

[27] The majority states that of the majority-black House Districts there are five under the new plan with less than 60% black population, while there were only two such districts under the 2001 plan. *Ante* at 147-8. I am puzzled by this observation.

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effectively achieved or surpassed their quotas in 75% of the majority-black districts.

Moreover, the majority points to no evidence that the drafters' quotas ever actually did give way to any "other objectives." *Ante* at 132. While the percentage was lowered in some districts,[28] the record contains essentially no evidence to explain why. In fact, the only objective Hinaman ever cited to explain lowering the black percentage of a majority-black district was the creation of another majority-black district near HD 19, namely the displaced HD 53. Tr. Vol. III at 161-2. Maintaining the same number of majority-minority districts was part of the drafters' understanding of what § 5 required; thus this explanation cannot support the conclusion that factors *other than* race trumped the drafters' quotas. Hinaman never testified that he lowered the black percentage in any district for any other reason.

Using the 2010 census data and the 2001 district lines, as Hinaman did in seeking to achieve his quotas, there were actually six districts under 60% black (HD 32, 53, 54, 82, 83, 84) in addition to HD 85, which was under 50% total black population under the 2001 plan. APX 6. How many districts were over 60% black under the 2001 plan *with 2000 census data,* the figure on which the majority apparently relies, is not relevant to the consideration of the drafters' success in achieving their quotas, which were defined by the 2001 districts *with 2010 census data.*

[28] HD 19 (-8.54%); HD 58 (-5.08%); HD 77 (-6.58%); HD 78 (-4.14%); HD 98 (-5.23%); HD 99 (-7.75%); HD 103 (-4.6%); SD 19 (-6.26%); SD 20 (-14.58%).

In fact, based on this record, the most likely explanation for the lower black percentage in some districts is that there were simply not enough black people nearby to maintain the already high black population percentages in some districts. It appears in some cases even extreme racial gerrymandering was not enough to find all the black people the drafters sought. But the fact that the drafters ultimately could not find enough black people to fill their quotas certainly does not mean that they did not try; and sorting people by race in the process of *trying* to achieve racial quotas is quite enough to trigger strict scrutiny.

Looking to where the drafters fell short is a distraction from the important point, which is where they succeeded. In most of the districts, the drafters of these plans either surpassed their quotas or effectively achieved them (to within a percentage point). In some cases, the precision with which the drafters refilled districts with the exact number of black individuals they sought is breathtaking. The most extreme example is HD 52. There, the quota was an additional 1,145 black people; the drafters added 1,143. *See* note 3, *supra*; APX 6. Out of a total population of 45,083, this represents racial sifting down to the finest level, a racial exactitude that would be admirable in its skill if it were not illegal.

In any event, if, with the observation that the drafters were not using a bright-line rule, the majority is suggesting that the drafters were pursuing 'goals,' or some synonym of that term, then "[t]his

semantic distinction is beside the point." *Bakke,* 438 U.S. at 289 (Opinion of Powell, J.). "Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race." *Id.* In this case, the drafters have described setting a specific percentage of black population to achieve in each majority-black district. Thus, semantics aside, strict scrutiny applies.

V.

Even if the racial quotas, standing alone, were not enough to require strict scrutiny in this case, there is ample circumstantial evidence to establish that such scrutiny applies. That evidence shows that, time after time, the drafters subordinated various other districting factors to the goal of achieving their racial quotas.

Filling those quotas posed an enormous challenge to the drafters. In order to maintain the black percentage in the majority-black districts while repopulating the districts up to compliance with the 2% rule, the drafters needed to add over 120,000 additional black people to the majority-black House Districts. *See* note 3, *supra.* This amounted to 19.7% of total black population in the State not already living in a majority-black House District. *See* note 5, *supra.* When one considers that many of the black people in Alabama but not already living in a majority-black district were likely dispersed around the rest of the State, the chance of finding those 120,000 in areas

contiguous to the majority-black districts is even smaller. The same is true in the Senate: the drafters needed to find over 106,000 additional black people in order to achieve their twin goals. *See* note 7, *supra*. That amounts to some 15.8% of the black population not already living in a majority-black Senate District. *See* note 8, *supra*.[29]

The challenge of meeting those quotas explains why the drafters drew these plans in the way they did; indeed, seeking to achieve the racial quotas drove everything. An examination of the steps the drafters took in seeking to maintain the previous black population percentages offers compelling circumstantial evidence that race predominated, further supporting the direct evidence already discussed.

For example, the racial quotas trumped the drafters' stated goal of accommodating the preferences of incumbents. Dial rejected Keahey's numerous suggestions, despite the fact that the legislators from nearby majority-black districts agreed to those suggestions. Of course, Dial was under no legal obligation to accept those suggestions; but his *reason* for

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[29] The majority argues that, during the 2001 redistricting, the legislature, then controlled by Democrats, also moved many black individuals into majority-black districts. The majority fails to point to any evidence in the record to support the conclusion that the State did so to achieve quotas, or that it subordinated any other districting principles in the process. But, most importantly, even if the State's conduct in 2001 were unconstitutional, that would not excuse the State's constitutional violations in this case.

doing so was Keahey's failure to achieve the correct quota. Keahey had sought to avoid Dial's idea of retrogression, but had mistakenly used the 2000 data instead of the 2010 data. The resulting discrepancy, that the black population in the nearby districts was lower than the quota by a percentage point or two, was enough to disqualify Keahey's suggestions. Like New York's rejection of a proposal which would have lowered the minority population just slightly in *UJO*, Dial's rejection of Keahey's proposals shows that the drafters rigidly adhered to their quotas.

Similarly, the quotas led Hinaman to abolish HD 53 and 73 in order to distribute their mostly-black populations among the surrounding majority-black districts. In those districts, the racial quotas trumped the stated goals of both maintaining the core of districts and avoiding conflicts between incumbents. Indeed, Hinaman testified that this latter priority was a "nice goal," but one that "[d]idn't always work out." Tr. Vol. III at 161; as the evidence establishes, that goal did not work out because it came into conflict with achieving the racial quotas.

The quotas also led Hinaman to "reach[ ] out" to find majority-black precincts to add to majority-black districts. Tr. Vol. III p. 141-2. And, when precincts with enough black people were not available at hand, it led him to split "massive" numbers of precincts, Tr. Vol. II at 105, some 25% across the State, largely along racial lines.

Hinaman's racial methodology in splitting precincts shows how far the drafters went to reach the target percentages of black people. Maptitude, the computer program he utilized, contained racial data at the census block level, but not political data. This means that when he split that "massive" number of precincts, Tr. Vol. II at 105, he could not have done so based on how many Democrats or Republicans lived in each census block. Rather, it was racial data to which Hinaman looked in splitting precincts. And, indeed, Hinaman testified that he would split precincts in order to avoid what he considered retrogression. Tr. Vol. III p. 143. In addition, splitting a precinct by blocks required extra work, extra "clicking." Tr. Vol. III p. 166. Each split was an affirmative choice, and the data on which Hinaman relied in making those choices were racial.

The Supreme Court has found this kind of evidence of racial methodology particularly compelling. In *Vera,* the plurality described a strikingly similar computer system to the one used here:

> "REDAPPL permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed updated racial composition statistics for the district as drawn. REDAPPL contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of

> voter tabulation districts (which approximate election precincts)."

517 U.S. at 961 (plurality opinion); *see also* Hinaman Dep., APX 75, at 123-4 (describing his use of racial data in Maptitude). The *Vera* plurality found that "the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria here." 517 U.S. at 963 (emphasis omitted). In particular, since only racial data were available at the subprecinct level, evidence of split precincts along racial lines suggested that "racial criteria predominated." *Id.* at 970-71. The same is true here. As in *Vera,* Hinaman's race-based methodology is powerful evidence that race predominanted, particularly in combination with the direct evidence of racial quotas.

The majority in this case concludes that "at least some of the precinct splits" were attributable to the 2% rule. *Ante* at 146. I agree this is probably true; Hinaman cited population deviation as the other reason to split precincts, along with compliance with the VRA. But the evidence shows that many if not most of the splits were made based on racial data. Cooper testified that, "If the only concerns were maintaining 27 majority black districts and achieving a plus or minus 1 percent deviation, you wouldn't need to split anywhere near that many precincts." Tr. Vol. II at 105. And Arrington noted that, as in SD 26, the splits

were mostly along racial lines statewide; if Hinaman were primarily splitting precincts to equalize population, there is no reason he would need to separate black residents from white ones in this way. The plaintiffs certainly do not need to show that *every* precinct split was racially motivated to establish that the drafters went to great lengths to achieve their racial quotas. The circumstantial evidence that Hinaman relied on the race of voters in deciding how to split many precincts, along with the other circumstantial evidence and the direct evidence of racial quotas, amply establishes that race was the predominant factor.

vi.

The majority finds that race cannot have been predominant because there is a factor, namely the 2% rule, that was not subordinated to race. The majority also points out that the drafters considered other factors as well. While I readily concede that the drafters abided by the 2% rule, and that they considered other factors, I must respectfully disagree that this allows their use of racial quotas to escape strict scrutiny.

The fact that a *Shaw* claim is a "mixed motive suit" does not mean that no racial gerrymander exists. *Vera,* 517 U.S. at 959. On the contrary, in *Vera* the plurality, after noting, as the majority does here, that "The record does not reflect a history of purely race-based districting revisions," *Vera,* 517 U.S. at

959 (emphasis and internal quotation marks omitted), went on to strike down that plan under *Shaw*. The question there, as here, was whether race predominated over other factors as to any individual districting decision.

But in considering that question, the majority misapprehends the appropriate analysis. It appears the majority believes that race cannot predominate as long as there is *some factor* which is not subordinated to race. But this is wrong. The fact that the drafters pursued "multiple objectives," *Vera,* 517 U.S. at 972, does not preclude a finding of racial gerrymandering; again, that was the case in *Vera,* and the plan in that case was struck down. The existence of *some factor* which is not subordinated to race cannot defeat a *Shaw* claim.

For example, contiguity of a district is a traditional districting factor; the *Miller* Court cited it as a factor that, if subordinated to race, could establish that race predominated. 515 U.S. at 916. Does that mean that contiguity must *always* be subordinated to race in order to prevail on a *Shaw* claim? On the majority's view, it would appear so: unless a district was non-contiguous, for example split into to unconnected sections on different sides of the State, then race would not predominate. But, of course, that is not the law; for example, in *Miller* the Court struck down a district despite the fact that every part of it was connected to every other part. *See id.* at Appendix B.

The majority views the question of race predominating as a sort of ranking of factors as to the overall plan: since the 2% deviation rule is above the racial quotas in the drafters' hierarchy overall, no amount of sorting people by the color of their skin can trigger strict scrutiny. In other words, the majority believes that once some race-neutral factor is established as the highest priority for the plan as a whole, that means that no *Shaw* claim can succeed as to any part of that plan. But this is not the Supreme Court's analysis.

Instead, the Supreme Court has established that the harm of racial gerrymandering is a *local* one: the court must scrutinize each and every individual district to see whether race was the predominant factor. In *Vera,* for example, the plaintiffs initially challenged 24 of Texas' 30 congressional districts; the district court found *Shaw* violations in three of those districts, and the Supreme Court upheld that finding as to those districts. 517 U.S. at 957 (plurality opinion). The analysis was not what factors were predominant as to the plan as a whole, or even as to all 24 challenged districts considered together, but whether race was the predominant factor as to any one district individually.

Furthermore, a plaintiff need not even show that race was the predominant factor as to an *entire* district. In *Miller,* the Court stated that the plaintiff's burden in a *Shaw* case was to show "that race was the predominant factor motivating the legislature's decision to place a *significant number of voters* within

or without a particular district." 515 U.S. at 916 (emphasis added). The plaintiffs have made just this showing, establishing that racial quotas led the drafters to place *very* significant numbers of people in the majority-black districts because they were black.

From this perspective, it is clear the 2% rule cannot explain why all these districts were drawn as they were. The drafters' quotas for SD 26 called for that district to have 72.75% black population after reapportionment; the district is over 75% black under the new plan. How does the 2% rule explain why black people ended up on one side of the district line and white people ended up on the other? How can it explain why just 36 out of 15,785 new residents of SD 26 were white, despite the racially mixed demographics of the areas from which those people were drawn? The answer is clear: it does not.

In fact, it is clear that one factor and one factor alone explains why SD 26 is 75% black: race. The drafters had a quota for that district, which they believed was required under § 5, and they reached and exceeded that quota. Nothing else explains that percentage. The same is true of SD 23, with a quota of 64.79% black and an eventual population of 64.81% black. And the same is true of HD 55, with a quota of 73.54% black and an eventual population of 73.6% black. And the same is true of HD 67, with a quota of 69.14% black and an eventual population of 69.2% black. The 2% deviation rule simply does not explain

away this clear reliance on, and achievement of, racial quotas.

But the Supreme Court's cases establish that, when confronted with compelling evidence of this sort that district lines were motivated by race, a State seeking to avoid strict scrutiny must show that another factor *explains away* the apparent reliance on race. That is, the Supreme Court's cases establish that a State may seek to show that "correlations between racial demographics and district lines may be explicable in terms of nonracial motivations." *Vera*, 517 U.S. at 964.

In *Vera*, the alternative the State offered was incumbency protection. The State argued that the direct and circumstantial evidence that race predominated was rebutted because another factor, protection of incumbents, actually explained the apparently racial divisions of voters. The plurality rejected that argument on the facts, but acknowledged that such a showing would undermine the case for strict scrutiny. *Id.* at 964-5.

Similarly, in *Easley v. Cromartie*, the Court considered the argument that an apparent racial gerrymander was actually better explained as a partisan gerrymander. 532 U.S. 234, 257 (2001) ("The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior") (emphasis in original). The Court reversed the district court and found the evidence in that case insufficient to establish that the apparently

racial district boundaries were not in reality motivated by another factor. *Id.*

But the majority does not contend that the 2% deviation *rather than* the drafters' goal of achieving racial quotas can explain the racialized boundaries of the majority-black districts. Nor could it, for there is no evidence to support that contention. Thus, the majority's observation that the 2% rule never gave way to race is beside the point. The plaintiffs have come forward with compelling direct and circumstantial evidence that the drafters of these plans relied on a system of racial quotas to determine who would be added to the majority-black districts and who would not. The State's adherence to the 2% rule simply does not rebut that evidence.

Indeed, by and large the 2% rule served to increase the impact of the drafters' racial quotas. While most of the majority-black districts were underpopulated even using a more traditional 10% deviation rule, the 2% rule dramatically increased the number of additional black residents the drafters needed to find in order to achieve the quotas. This led to the sorting of individuals by race on a vast scale across the State in order to achieve racial quotas. Far from absolving the State of its liability under *Shaw*, it appears that in this case the 2% rule further aggravated the constitutional harm.[30]

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[30] While I reject the notion that the 2% rule explains why all the majority-black districts have the black percentages they

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Thus, there is no legitimate basis for rejecting the conclusion that race predominated in this case. The State did consider other factors, but the evidence is clear: race was the predominant factor in drawing the majority-black districts. Incumbency protection was a factor; but when Hinaman determined that he needed additional black residents for the underpopulated districts in Montgomery and Jefferson Counties, he abolished HD 53 and HD 73, leaving their incumbents in another legislator's district. Preserving the core of districts was a factor, but again one that gave way to race in the cases of HD 53 and HD 73, which were abolished and redrawn elsewhere. Respecting political subdivisions was a factor; but, in order to sift the black people from the white, Hinaman split massive numbers of precincts, depositing their black residents in the already heavily-black districts and their white residents in the adjoining majority-white districts.[31] Compactness was a factor;

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have, I should not be understood to say that the rule could not have had some determinative line-drawing role as to a particular district. One of life's lessons (which, unfortunately, I have not always been able to abide) is to avoid speaking in absolutes. Thus, if there is a majority-black district for which the 2% rule explains, even in part, why its lines are as they are, I am willing to engage the majority in a determination of whether the plaintiffs should prevail as to that district. With this dissent, as I have stated, I am not saying that the plaintiffs should prevail as to all the districts. What I am saying is that there must be an individual assessment for each district as whether race was a predominate factor.

[31] The same is true of counties. At his deposition, Hinaman testified that " . . there would be county splits potentially based

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but when Hinaman made up for SD 26's underpopulation with new residents that were overwhelmingly black (and 99.8% minority), he did so by creating a bizarre district that wraps around the white portions of Montgomery.[32] Honoring the wishes of incumbents was a factor; but, as with Keahey's nearly ten proposed alternative maps, those wishes were ignored if they came into conflict with the drafters' rigid quotas. Preserving communities of interest was apparently a factor; but ultimately the boundaries of the majority-black districts were predominantly drawn in order to achieve the racial quotas for each district. These plans were a racial gerrymander.

C. Narrow Tailoring

Such a finding does not, of course, end the analysis. The State may save these plans by showing that

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on the Voting Rights Act and not retrogressing a Majority/Minority district." Hinaman Dep., APX 75, at 34.

[32] The majority emphasizes that the districts in this case are not as bizarre as those rejected in *Shaw,* 509 U.S. at 644, or *Vera,* 517 U.S. at 973. The Supreme Court has made it clear that bizarre district lines may be evidence of a *Shaw* violation, but are not a necessary part of such a claim. *Miller,* 515 U.S. at 913 ("Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing it district lines.").

they are narrowly tailored to achieve a compelling government interest. *Miller,* 515 U.S. at 904. The majority concludes that compliance with the VRA is a compelling state interest, and I agree.

The Supreme Court has made clear, though, that to qualify as narrowly tailored, the district as drawn must be "required by a *correct* reading of § 5." *Shaw II,* 517 U.S. at 911 (emphasis added); *see also Miller,* 515 U.S. at 921 (district must be "required by the substantive provisions of the Act"); *ante,* at 160 ("we conclude that a plan will be narrowly tailored to achieve that interest when the race-based action taken was reasonably necessary under a constitutional reading and application of the Act"). And the legislature must have had a "strong basis in evidence" that its action was "needed in order not to violate" the VRA. *Shaw II,* 517 U.S. at 915. As I will explain, these plans must fall because they are not required by any correct reading of § 5; because the drafters had no strong basis in evidence to believe they were required by § 5; and because in any event § 5 can no longer justify a racial gerrymander after *Shelby County.*

i.

The State has made a number of arguments about why its racial quotas were narrowly tailored to achieve the compelling purpose of compliance with § 5. Those arguments are all without merit.

The drafters of the proposed plans have all described their understanding of what was necessary to obtain preclearance in the same terms: they needed to maintain the same overall number of majority-minority districts and, within those districts, they needed to get as close as possible to maintaining the black percentage of the population calculated with the 2010 census data imposed on the 2001 redistricting plan. As I have explained, this amounted to imposing a racial quota on each such district.

All of the drafters expressed concern that doing less might expose them to denial of preclearance by the Justice Department. *See* Tr. Vol. III at 145 (Hinaman believed that "if I was significantly below [those percentages], I was concerned about that being retrogression that would be looked upon unfavorably by the Justice Department under Section 5"); Tr. Vol. I at 42 (Dial believed "our job was to get a plan . . . that would meet Justice"); Tr. Vol. III at 220-1 (McClendon's goal was Justice Department approval, and he was not aware of any hard numbers in terms of percentages that would be "okay"). The drafters have argued that this understanding was "not unreasonable." Dfs. Proposed Findings of Fact and Conclusions of Law (Doc. No. 196), at 85. The State argues that erring on the side of caution is appropriate, particularly because the Justice Department review process is so "opaque." *Id.* at 30; *see also* Tr. Vol. I at 12 (The State, in opening statement, noting that "To the extent the Department of Justice says anything, it's pretty well general. Not too many African

Americans in a district, not too few, but there's no specifics.").

Whether the State's understanding was unreasonable is not the appropriate question under *Miller* and *Shaw II*. Nor is the question whether the Justice Department would approve or "look favorably" on the plans, or whether the drafters could accurately predict how the Justice Department would proceed. In *Miller*, the Court rejected the idea that narrow tailoring is satisfied by actions taken in order to obtain preclearance as a practical matter. 515 U.S. at 921 ("It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Act."). In that case, the Justice Department had demanded that the State draw certain districts as part of its preclearance review; the Court found that this was not sufficient to establish that those districts were narrowly tailored. *Miller*, 515 U.S. at 922 ("We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues."). Rather, the only way to survive strict scrutiny is to show the plans were *actually required by the statute*. *Id.* at 921.

On this point, the State argues that, "Given the fact that the State's plans have been precleared, the State's reading of Section 5 cannot be said to be incorrect." Dfs. Proposed Findings of Fact and Conclusions of Law (Doc. No. 196), at 83; *see also id.* at 85

(arguing the drafters' understanding was not "demonstrably incorrect"). This, again, is wrong. First, under strict scrutiny it is the State's burden to establish that its action was required under a correct reading of the statute, not the plaintiffs' burden to show the drafters' understanding was demonstrably incorrect. *Miller*, 515 U.S. at 920; *Fisher*, 133 S. Ct. at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden . . ").

Second, the fact that the Justice Department precleared the plans does not determine one way or the other whether the State's actions were actually mandated by the substantive statute. This would be so even if the drafters had correctly interpreted the Justice Department's commands. "Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 922. Here, however, the Justice Department never commanded the State to adopt its quotas; the drafters merely inferred, or believed, or guessed that such a step would smooth the preclearance process. That is insufficient to establish that the drafters' actions were narrowly tailored.

In reality, the drafters' understanding of § 5 was woefully incorrect, and as a result their solution is not narrowly tailored. Nothing in § 5, or in the cases interpreting it, required the State to adopt and

adhere to these quotas. In *Beer v. United States,* the Supreme Court noted that "the purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with *respect to* their effective exercise of the electoral franchise." 425 U.S. 130, 141 (1976). Thus, § 5 as properly interpreted requires a State to determine whether an action would reduce minority voters' effective ability to elect candidates of choice; it does not command the State to match the pre-existing level of minority population.

The State relies on *Texas v. United States,* a recent three-judge-court § 5 case, as establishing that "'A district with a minority voting majority of sixty-five percent (or more) essentially guarantees that, despite changes in voter turnout, registration, and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidate of choice.'" Dfs. Proposed Findings of Fact and Conclusions of Law (Doc. No. 196) at 86 (quoting *Texas v. United States,* 831 F. Supp. 2d 244, 263 & n.22 (D. D.C. 2011)). In the State's view, *Texas* establishes that the State's decision to add black people to majority-black districts as it did was required under § 5. The State is incorrect.

In the relevant portion of its opinion on summary judgment, the *Texas* court established that a majority-minority population of 65% percent "essentially guarantee[d]" ability to elect in that case. 831 F. Supp. 2d at 263. *Texas* was a § 5 case, in which the issue was

whether certain districts the State had drawn *violated* § 5 by retrogressing minority voting power. In establishing its per-se 65% rule, the court was making an evidentiary ruling: when it examined whether a given district the legislature had drawn was likely to elect a candidate of minority voters' choice, a 65% minority population was sufficient evidence standing alone. This amounts to a common-sense observation: at some point a State may put so many minorities in a district that 'the numbers speak for themselves' when it comes to the ability of that minority group to win elections in the district.

In this case, the question is not whether certain districts *violated* § 5 (for example by containing a minority population that is too low), but whether § 5 *required* the drafters to adopt the quotas as they did. Therefore, the court's observation in *Texas* that 65% minority populations are essentially guaranteed to be able to elect candidates of choice is not relevant here; the same is true, of course, of 75%, or 85%, or 100% minority districts. That tells one nothing about whether § 5 requires such high percentages. Thus, in sum, the State offers no reason to believe that its racial quotas were actually required by § 5.

ii.

The majority agrees with the State that these plans were justified by § 5. But, while the majority's interpretation of § 5 is different from the State's, it is no less mistaken. In the majority's view, the drafters'

conduct was narrowly tailored because the 2006 amendments to the VRA altered the standard for assessing retrogression. In those amendments, Congress expressly noted its intention to overturn the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, § 2, 120 Stat. 577, § 2(b)(6) (2006). The majority concludes that the amendments mean that "any diminishment in a minority's ability to elect its preferred candidates violates section 5." *Ante* at 167. The majority further concludes that this, in turn, required the State, "where feasible," to "not substantially reduce the relative percentages of black voters" in majority-black districts. *Ante* at 169. In other words, as the majority reads the amended statute, it required the drafters to do just what they did: adopt the previous black percentages as racial quotas for each district.[33]

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[33] As I understand the majority's test, any reduction in the black percentage, other than an unavoidable reduction, constitutes retrogression. At some points in its discussion, though, the majority qualifies this test: only "significant" or "substantial" reductions would be retrogressive. The majority does not explain what constitutes a significant or substantial reduction, or how a State is supposed to determine what is significant or substantial. I must conclude that these qualifiers are rhetorical rather than substantive. For if § 5 actually permitted *some* reduction of the black percentage on the majority's view, that view could not save these plans. For example, imagine any reduction up to 5% counts as insignificant. If the drafters hit their quotas of 65% black in a particular district, then even on the majority's view

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The interpretation of the amended § 5 which the majority adopts is the wrong one. In the majority's view, the 2006 amendments mean that any reduction in the black percentage of a majority-black district is per-se retrogressive (except where that reduction is unavoidable). The problem is that this interpretation is contrary to the intent of Congress; has been rejected by both entities primarily responsible for administering § 5; and would create serious, if not fatal, constitutional concerns.

In order to explain why the majority's reading is wrong, I must first explain how the majority arrives at its conclusion, and where we part ways. The majority first finds that the 2006 amendments altered the retrogression analysis under § 5 to make it more stringent, and I agree. The majority also concludes that the amendment to the language of § 5 served, in relevant part, to overturn the Supreme Court's decision in *Georgia,* and to restore the standard articulated in *Beer,* 425 U.S. at 141 ("the purpose of [§] 5

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§ 5 only would have *required* 60% black population. The additional 5% black population under the new plan would have been included by racial gerrymandering without a narrowly tailored justification, and so the plans would be struck down. *See Miller,* 515 U.S. at 916 (a racial gerrymander exists when "race was the predominant factor motivating the legislature's decision to place *a significant number of voters* within or without a particular district") (emphasis added). Thus, to justify the establishment and accomplishment of racial quotas in this case, the majority's view of § 5 must be that it required the drafters to hit their marks where possible, without any carve-out for 'insignificant' or less-than-substantial reductions.

has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). Again I agree.

The *Georgia* decision introduced a "totality of the circumstances" approach to determining whether a change would be retrogressive under § 5. The Court found that the ability of a minority group to elect a candidate of choice was important, but was not the only relevant factor. In addition, the Court held, retrogression analysis must take account of the minority group's ability to participate in the political process. In particular, the Court found that "influence" districts, in which the minority group cannot elect a candidate of choice but can "play a substantial . . . role in the electoral process," could compensate for a reduction in the number of districts in which minorities could elect candidates of choice. 539 U.S. at 482. Also, the Court found that representatives of the minority group holding positions of "legislative leadership, influence, and power" was a factor suggesting that a new plan was not retrogressive. *Id.* at 483. Because the Court determined that the district court had focused too narrowly on ability to elect, it remanded the case for analysis under the totality of the circumstances test. *Id.* at 485.

The majority finds that, in rejecting *Georgia,* Congress commanded that Alabama could not reduce "the percentages of black voters in the majority-black districts because to do so would be to diminish black

voters' ability to elect their preferred candidates." *Ante* at 167. That is, the majority believes that, after the 2006 amendments, any reduction in a minority group's percentage of the population in a given majority-minority district reduces the ability to elect, and is per-se retrogressive. I will explain why this is incorrect.

First, though, I pause to observe just how implausible this reading of the statute is. On the majority's view, if a district is 99% black, the legislature is prohibited by federal law from reducing the black population to a mere 98%. Read in this way, § 5 would become a one-way ratchet: the black population of a district could go up, either through demographic shifts or redistricting plans (like this one) that raise the percentage of black people in some majority-black districts. But the legislature could never lower the black percentage, at least so long as it was "feasible" to avoid it. *Ante* at 169. Why? Because any reduction in the black population of a district would "by definition . . . diminish black voters' ability to elect their preferred candidates." *Id.* at 167. With respect, this result cannot be.

It is also not what Congress intended. As amended, § 5 provides in relevant part that a voting change is prohibited if it "will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Congress specified that the purpose of the above-quoted language "is to protect the ability of such citizens to elect their

preferred candidates of choice." 42 U.S.C. § 1973c(c). It is clear from this language that "'ability to elect' is the statutory watchword." *Texas,* 831 F. Supp. 2d at 260.

The congressional findings, and the legislative history, make it clear that the goal of this new language was to overturn *Georgia.* In the majority's view, this change means that now any reduction in a minority group's proportional share of the population in a district is retrogressive. The better reading of Congress' intent is that, in emphasizing "ability to elect," Congress sought only to overturn the aspect of *Georgia* that so many found disturbing: namely the prospect that States would trade away districts where minority voters had actual ability to elect in exchange for amorphous influence districts or apparently politically powerful jobs for minority representatives. The House Committee Report described the problem in this way:

> "Under its 'new' analysis, the Supreme Court would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community while removing that community's ability to elect candidates. Permitting these trade-offs is inconsistent with the original and current purpose of Section 5."

H.R. Rep. No. 109-478, at 69. Congress rejected this idea, endorsing instead the position of the dissent in *Georgia. See id.* at 68 n.183 ("The dissent in [the]

Georgia v. Ashcroft case correctly pointed out that a 'totality of the circumstances' under Section 5 is hopelessly unadministrable by the Department of Justice because such a concept does not retain 'the anchoring reference to electing a candidate of choice.' ") (quoting *Georgia,* 539 U.S. at 493 (Souter, J., dissenting)). Rather than the extreme interpretation embraced by the majority in this case, it is clear that what Congress intended when it sought to overturn *Georgia* was to legislatively adopt the position of Justice Souter's dissent in *Georgia.*

But Justice Souter's dissent did not interpret § 5 in the way the majority does in this case. On the contrary, Justice Souter *agreed* with the majority in *Georgia* that reducing the percentage of black population in a majority-black district would *not* necessarily be retrogressive. "The District Court began with the acknowledgment (*to which we would all assent*) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive." *Georgia,* 539 U.S. at 498 (Souter, J., dissenting) (emphasis added); *see also id.* at 504 (Souter, J., dissenting) ("nonretrogression does not necessarily require maintenance of existing supermajority minority districts").

Justice Souter's view on this issue was hardly lost on Congress. Most of the debate surrounding the changes to the retrogression standard focused on whether or not "coalition" districts (in which a minority group does not constitute a majority but can

routinely elect candidates of choice in coalition with other racial groups) could constitute "ability to elect" districts for § 5 purposes. That question is not presented in this case. The question that is presented here – whether a minority percentage that is lower than the benchmark[34] plan is always retrogressive – was not widely debated. But the two discussions of it in the legislative history firmly reject the majority's view.

Representative Watt, a leading proponent of the bill in the House and chair of the Congressional Black Caucus at the time, specifically noted and endorsed the *Georgia* Court's unanimous position on this issue during a key hearing on the effect of *Georgia* on the retrogression standard:

> "*Nine justices agreed, as do I, that section 5 does not prohibit the reduction of super majority minority voting age population percentages from that in a benchmark plan.* Where the majority in *Georgia v. Ashcroft* strayed, however, losing four justices in the process, was in its failure to enunciate an articulable standard under which the opportunities to elect are preserved."

Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary, 109th Cong. 109-74 (2005) at 5 (emphasis added).

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[34] In § 5 analysis, the benchmark plan refers to the last districting plan in place before the challenged alteration.

The principal sponsors of the amendments in the Senate agreed. During floor debate, some senators had suggested that coalition districts would not be protected by the retrogression standard. Senator Leahy responded by entering into the record a statement reflecting "my understanding of the purpose and scope of [the relevant] provisions as an original and lead sponsor." 152 Cong. Rec. 96, S8004 (2006). That statement provided:

> "This change to Section 5 makes clear that Congress rejects the Supreme Court's *Ashcroft* decision and reestablishes that a covered state's redistricting plan cannot eliminate 'ability to elect' districts and replace them with 'influence districts' . . . *The amendment to Section 5 does not, however, freeze into place the current minority voter percentages in any given district.* As stated by the dissenters in *Georgia v. Ashcroft,* as well as by Professor Arrington and Professor Persily at the Committee hearings, *reducing the number of minorities in a district is perfectly consistent with the pre-Ashcroft understanding of Section 5* as long as other factors demonstrate that minorities retain their ability to elect their preferred candidates."

Id. (emphasis added); *see also id.* at S8009 (Sen. Feingold, "[a]s ranking member of the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Property Rights," concurring with Sen. Leahy's understanding).

Equally striking is the fact that no one contested this understanding. While there was a concerted effort by some in the Senate to establish that the retrogression standard would not lock in coalition districts, no one ever suggested that Congress was adopting the novel and implausible standard the majority posits in this case. Indeed, there is nothing in the text, nothing in the legislative history, and nothing in the dissent in *Georgia* which would support the majority's view.[35]

That view has also been rejected by the U.S: District Court for the District of Columbia, which is entrusted with the primary responsibility for enforcing § 5. The D.C. District Court's most extensive application of § 5 after the 2006 amendments came in the *Texas* case. In the opinion after trial in that case, the three-judge court rejected the idea that lowering the minority percentage of a supermajority district is per-se retrogressive. In considering the changes to Texas' House District 41, the court noted that the

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[35] The majority also relies on a law review article suggesting a possible interpretation of the 2006 amendments. It is noteworthy that the actual conclusion of that article is a rejection of the majority's view as well: "[G]iven that the statute will be in place for twenty-five years, the standard ought to be flexible enough to adapt to changing political realities. An interpretation of the standard that would freeze the current minority percentages in all covered districts, for example, ignores the realistic possibility that the percentages required for minorities to elect their preferred candidates will likely change over time." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 218 (2007).

Hispanic citizen voting-age population had been reduced from 77.5% in the benchmark plan to 72.1% in the new plan. *Texas v. United States,* 887 F. Supp. 2d 133, 169 (D.D.C. 2012), *vacated and remanded on other grounds,* 133 S. Ct. 2885 (U.S. 2013). Under the test adopted by the majority in this case, that information by itself would establish retrogression. But the *Texas* court rejected a claim that this change was retrogressive, finding that even with a lower percentage of the population, Hispanic voters still had the ability to elect candidates of choice. *Id.*

Instead of the majority's test, which looks solely to whether a minority group's percentage of the population is lower than it had been under the benchmark plan, the *Texas* court adopted a "functional" approach. Rejecting the State's argument that the court should look only to population demographics, the court found that it was necessary to examine a number of factors to determine whether a minority group has the ability to elect candidates of choice. "A single-factor inquiry, such as the test Texas proposed relying on racial and ethnic population statistics alone, is inconsistent with precedent and too limited to provide an accurate picture of the on-the-ground realities of voting power." *Id.* at 140. Rather, the court established at summary judgment that "Section 5 analysis must go beyond mere population data to include factors such as minority voter registration, minority voter turnout, election history, and minority/

majority voting behaviors." *Texas,* 831 F. Supp. 2d at 263.[36]

This is substantially the same interpretation of the amended § 5 as that adopted by the Justice Department, the other primary adjudicator of preclearance. In its updated guidance, released in 2011, the Justice Department, like the D.C. District Court, applies a functional, multi-factor test. *See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act,* 76 Fed. Reg. 27, 7471 (Feb. 9, 2011). As the Justice Department interprets § 5, the analysis of retrogressive effect "*starts* with a basic comparison of the benchmark and proposed plans at issue, using updated census data in each." *Id.* (emphasis added). But it does not end there:

> "In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data

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[36] Justice Souter's dissent in *Georgia* suggested a similar approach: "percentages tell us nothing in isolation, and . . . without contextual evidence the raw facts about population levels" cannot show retrogression or lack of retrogression. 539 U.S. at 505.

> alone may not provide sufficient indicia of electoral behavior to make the requisite determination."

Id. In other words, both the D.C. District Court and the Justice Department have explicitly rejected the majority's interpretation.

And with good cause. The majority's interpretation of the amended § 5 would raise serious, if not fatal, constitutional concerns. There is an inherent tension between the race consciousness of the VRA, and in particular § 5, and the protections of the Fourteenth Amendment. *See Vera,* 517 U.S. at 995 (O'Conner, J., concurring) ("The VRA requires the States and the courts to take action to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government").

Yet the majority urges an interpretation of § 5 that would require States to engage in hugely racialized redistricting; indeed, an interpretation that would require States to redistrict in compliance with racial quotas. Under the majority's rule, a State faced with a 90% minority district has no choice: it must find nine minority individuals for every 10 needed to repopulate the district. Racial gerrymandering would become unavoidable, essentially required by a federal statute. "When [an] interpretation of the [VRA] compels race-based districting, it by definition raises a

serious constitutional question." *Miller,* 515 U.S. at 923.

UJO, discussed above, places these constitutional questions in stark contrast. Chief Justice Burger's dissent, which applied the *Shaw* reasoning later adopted by the Court, rejected the defendants' rigid adherence to a specific minority percentage, 65%, in seeking to comply with § 5. He observed that there was "no indication whatever that use of this rigid figure was in any way related much less necessary to fulfilling the State's obligation under the Voting Rights Act as defined in *Beer.*" 430 U.S. at 183. Rather, he would have found this unjustified "rigid adherence to quotas" unconstitutional. *Id.* at 185-6 (internal quotation marks omitted). The interpretation the majority adopts is no less rigid; it too equates ability to elect with a certain predetermined percentage of the population. It raises the same constitutional questions that Chief Justice Burger identified.

But facing those constitutional questions is simply unnecessary. Congress did not seek to impose racial quotas on States, nor permanently to freeze in place minority supermajorities, long after minority groups' need for those supermajorities in order to elect candidates of choice has passed. The purpose of the VRA is to help minority groups achieve equality, not to lock them into legislative ghettos. Congress intended no such thing. The majority's interpretation of the amended § 5 is in error.

iii.

Applying instead the functional test articulated in *Texas,* I think it is clear that even substantial reductions in the black percentage of many of the majority-black districts would be permissible under § 5. As such, in seeking out so many black people to satisfy their unjustified racial quotas, the drafters "went beyond what was reasonably necessary to avoid retrogression." *Vera,* 517 U.S. at 983 (plurality opinion).

The *Texas* court's functional analysis requires the court to look to a variety of factors, including the mobilization of the minority group in question. In *Texas,* the court was concerned that many of the relevant factors meant that the minority group at issue in that case, Latinos, would require substantially more than 50% of the population to effectively elect candidates of choice. Evidence and congressional findings of low Latino rates of registration and turnout "underscore[d] why Texas' reliance on a bare majority-minority district [could not] be used to determine an ability district under Section 5." *Texas,* 831 F. Supp. 2d at 264. That is, *Texas* held that, considering the particular circumstances of Latinos in Texas, § 5 *required* substantially more than 50% minority population in majority-minority districts.

In this case, there is significant evidence that, in light of much-improved black voter mobilization and near-universal citizenship, the black voting population in Alabama can elect candidates of their choice at

significantly lower levels of population than the *Texas* court deemed necessary in that case. The evidence suggests that in Alabama black voters need to be only about 50% of a given district to be able to elect representatives of choice. *See* Arrington Report, NPX 323, at 17; Lichtman Report, NPX 324, at 21-2. If that is so, then even if the legislature substantially reduced the percentage of black residents of, for example, HD 55 (73% black), black residents would still have the ability to elect candidates of choice there. The point is not that the State was required to lower the black percentage of HD 55. Rather, it is that § 5 did not *prohibit* the State from doing so. And, that being the case, the State here cannot claim that the VRA *required* it to maintain HD 55 with 73% black people. Therefore, the drafters' conduct was not narrowly tailored.

The majority has found that much of the evidence that black voters can elect candidates of choice with little more than a bare majority is not credible, and therefore concluded that the record can support no conclusion about the minimum level of black population necessary to allow black voters to elect candidates of choice. I disagree with those factual determinations; in particular, I can discern no legitimate basis in the record for the majority to find Arrington's testimony not credible. *Compare ante* at 151-2 (rejecting Arrington's testimony) *with* Tr. Vol. III at 81-2; Arrington Report, NPX 323, at 19; *id.* at 17; Tr. Vol. III at 64-5 (Arrington giving reasonable and unrebutted explanations for supposed

inconsistencies). I would credit Arrington's testimony on this issue.

But, more importantly, even if one accepts the majority's conclusion that the record supports no determination one way or the other regarding the level of black population necessary to elect candidates of choice, *see ante* at 99, in the context of racial gerrymandering that conclusion can only harm the State's case. The burden is on it to establish that it had a "strong basis in evidence", *Miller,* 515 U.S. at 922, for the need for their purported solution, namely striving to fill racial quotas. If it has not shown a strong basis in evidence, because the record can support no conclusion one way or the other, then the racial gerrymander is unconstitutional.

The drafters' failure to take any steps to examine what § 5 actually required in this case underscores that these plans are not narrowly tailored. Hinaman testified that he did not review any studies of black voter participation in Alabama, did not look at variations among black communities, and did not use the political data he had available to examine effectiveness of majority-black districts. Tr. Vol. III at 148-150.[37] Dial testified that he did not inquire at all into

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[37] Specifically, with regard to his decision to abolish and relocate HD 53, Hinaman testified at his deposition that if he had maintained nine majority-black districts in Jefferson County their black populations might have been lowered. "They may have gone from 60 percent to 51 or something like that, and I didn't think that was – I thought that would potentially create

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what level of black population would be necessary to avoid retrogression in a given district:

> "Q. So your testimony is that you really didn't look into the behavior of individual districts. Instead, you simply went by the black – the number of black people, the black percentage in the district. And what you did was try and at least maintain that or increase it. Is that your – fair statement of your testimony?
>
> "A. That's fair, yes."

Tr. Vol. I at 133-4. Had any of the drafters analyzed the available data, they might (or might not) have had a "strong basis in evidence," *Miller*, 515 U.S. at 922, to conclude that § 5 required them to maintain the high percentages of black population; as they did nothing of the sort, they had nothing but guesses. And that is not enough to justify the use of racial quotas in drawing legislative districts.

The question here is whether the State was required by the VRA to seek out black people to add to the already heavily black majority-minority districts in order to achieve their racial quotas. And the clear answer is no. There was an available alternative: not to sift individuals by race at all, or only to do so to the extent actually required by the VRA, and

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preclearance issues." APX 75, at 61. He stated that he never tried to draw nine such districts. *Id.* He believed it would be possible to do so. *Id.* at 86.

instead to use other districting principles to draw those lines. They could have been guided by protecting incumbents, following natural and political boundaries, keeping districts compact, etc. Instead, the drafters reached out and grabbed as many black people as possible to achieve their racial quotas even as the total population of those districts grew. The conclusion is as clear as day: the drafters' action was not required under any correct reading of the statute, and so cannot survive as narrowly tailored.

iv.

Even if the drafters' racial quotas were somehow required by § 5, that would not be enough to save these plans, because Alabama is no longer subject to the preclearance requirements of § 5. The Alabama Legislative Black Caucus plaintiffs argue that the State cannot now rely on § 5 to justify its racial gerrymander because of the Supreme Court's intervening decision in *Shelby County,* 133 S. Ct. 2612, which was handed down after this case was filed but before trial. The majority responds that *Shelby County* struck down only § 4 of the VRA, 42 U.S.C. § 1973b, the formula for determining whether a jurisdiction is covered by § 5, but left § 5 itself undisturbed. However, without § 4, and absent further action by Congress, Alabama is no longer a covered jurisdiction subject to § 5 and need not obtain preclearance. *See Shelby County,* 133 S. Ct. at 2632 n.1

(Ginsberg, J., dissenting) (noting that "without th[e] formula, § 5 is immobilized").[38]

The majority then concludes that, even if compliance with § 5 is not now a compelling interest, the State's actions should be evaluated based on the circumstances when the plans were enacted, not those of the time of judgment. I disagree. These plans have not yet gone into effect, and "changed circumstances may . . . transform a compelling interest into a less than compelling one." *United States v. Antoine,* 318 F.3d 919, 921 (9th Cir. 2003). Indeed, when it comes to racial classifications, the solution offered must last no longer than the compelling interest on which the State relies. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 238 (1995) (plurality opinion) (part of narrow tailoring analysis is whether race-based solution "was appropriately limited such that it 'will

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[38] A jurisdiction may still be required to obtain preclearance of redistricting plans, even after *Shelby County,* under the "bail-in" provision of § 3 of the VRA. *See* 42 U.S.C. § 1973a(c); *Shelby County,* 679 F.3d at 855. That provision "authorizes courts to impose preclearance in response to violations of the Fourteenth and Fifteenth Amendments." Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance,* 119 Yale L.J. 1992, 2006 (2010). The state of the VRA is in flux at the moment, and it is unclear to what extent this provision will be utilized to fill the void left after *Shelby County. See* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html (Attorney General noting that he will seek a court order subjecting Texas to preclearance after *Shelby County*). However, Alabama has not been "bailed-in" and is therefore currently not subject to any preclearance requirement.

not last longer than the [problem] it is designed to [address]' ") (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 513 (1980) (Powell, J., concurring)). Here, relying on the fact that § 5 was still applicable at the time the drafters designed the plans, the State asks us to approve a race-based solution that has not only already outlived its problem, but also one that will be in effect into the next decade, through the 2020 census.[39] But the question in strict-scrutiny analysis is not whether the drafters acted in "good faith" when they enacted these plans, *see Fisher,* 133 S. Ct. at 2421, nor in strict scrutiny do we grant the kind of deference to which States are often entitled in other areas of law. *See id.* at 2420. In the absence of an actual compelling interest at the time of judgment, the court cannot approve a racial gerrymander.

v.

There is perhaps one last unarticulated premise to confront. One might think that the plaintiffs here, who are mostly black legislators and voters, should lose on their *Shaw* claims because the majority-black districts were drawn for their benefit. The plaintiffs in *Shaw* and its progeny were, after all, white voters who objected to the creation of majority-minority districts. It may be thought that there is

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[39] Indeed, because this plan will continue to be in effect for years, I would find that it was not narrowly tailored even if it had already gone into effect; in strict scrutiny, we simply cannot allow unjustified racial classifications to continue.

some incongruity to black voters bringing the same charge against districts in which they are the majority.

The Supreme Court's equal protection cases teach that it is sometimes difficult to discern when a race-conscious policy inures to the benefit of a minority group and when it covertly prejudices them. *See Vera,* 517 U.S. at 984 (plurality opinion) ("we subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign"); *Parents Involved,* 551 U.S. at 742 (plurality opinion of Roberts, C.J.) ("History should teach greater humility" than to assume one can differentiate good intentions from bad) (internal quotation marks omitted). Indeed, as Justice Thomas recently observed, "The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities." *Fisher,* 133 S. Ct. at 2429 (Thomas, J., concurring).

In this case, there is a deep dispute regarding the legislative purpose behind these plans. According to the drafters, they sought nothing more than to comply with their legal duties and honor their colleagues' wishes as far as that was possible. According to the plaintiffs, these redistricting plans are part of a scheme to eliminate all white Democrats in the State and thereby establish the Republican Party as the natural home for all white Alabamians, leaving the Democratic Party comprised of only black voters and legislators. In furtherance of that scheme, the

plaintiffs claim, the drafters packed as many black people as possible into the majority-black districts, thereby eliminating their influence anywhere else. All this, the plaintiffs claim, was done under the pretext of seeking to comply with § 5, while in reality the drafters were motivated by invidious racial discrimination. Apparently for this reason, no black legislator voted in favor of these plans.

In my view, we need not resolve the question of the drafters' ultimate purpose, nor need we reach the plaintiffs' other claims. For, again, to me this case is simple. In drawing the majority-black districts, Hinaman and the others were driven by an overriding consideration: the race of those individuals who would be included in or excluded from those districts. They adopted racial quotas for each district, and they went to extraordinary lengths to achieve those quotas. Whether they did so in a good-faith belief that the quotas were required by § 5, or for some invidious purpose, is ultimately of no consequence for the *Shaw* claims. But that they did so is as clear as day. Because the State has offered no sufficient justification for the use of racial quotas, the plans are unconstitutional, and I would so hold.

* * *

There is a cruel irony to these cases. Earlier this year, the State of Alabama passionately argued to the Supreme Court that it should be free from the VRA requirements of preclearance. *See* Br. of State of Alabama as Amicus Curiae, *Shelby County,* available

at 2013 WL 98691. The Court agreed, effectively removing the preclearance requirement for covered jurisdictions nationwide. Noting that "Our country has changed," the Court found that Congress's remedy for racial discrimination in voting failed to "speak[] to current conditions." *Shelby County,* 133 S. Ct. at 2631.

The evidence here is overwhelming that the State has intentionally singled out individuals based on race and cabined them into district after district. The drafting of majority-black districts was driven by naked racial quotas; that alone is enough to condemn these plans. But Alabama argues that these percentages were justified by, of all things, § 5. Even as it was asking the Supreme Court to strike down the requirement of preclearance for failure to speak to current conditions, the State of Alabama was relying on racial quotas with absolutely no evidence that they had anything to do with current conditions, and seeking to justify those quotas with the very provision it was helping to render inert.

To be sure, conditions 30 years ago or 20 years ago or even a decade ago (in or around 2001) may have justified requiring high percentages of black population in majority-black districts. Indeed, as I now consider Alabama's and the majority's argument that the record justifies these high racial percentages, I feel as if I were in a time warp carried back into the past, with the arguments being the same but with the parties having switched sides. But, again, the issue

here is, What are the conditions today? Not, what they were back then.

As a nation, we must continue to strive towards "the goal of a political system in which race no longer matters." *Shaw,* 509 U.S. at 657. But plans like the ones the Alabama legislature has adopted take us in the wrong direction; they continue to "balkanize us into competing racial factions," *id.*, "carving [us] into racial blocs." *Miller,* 515 U.S. at 927. The problem is not that these plans consider race, for some consideration of race is permissible and even required by the VRA. The problem is that these plans adopt severe racial quotas – seeking to match numbers as high as 78% black – with no evidence or even real argument that their extreme reliance on race is necessary. The Supreme Court's jurisprudence of race condemns them.

Therefore, just as the Supreme Court, in applying principles of federalism, found in *Shelby County* that Congress's remedy for racial discrimination in voting failed to "speak[] to current conditions," *Shelby County,* 133 S. Ct. at 2631, this court, applying strict scrutiny, should likewise find that the Alabama Legislature's racially based redistricting plans fail to speak to current conditions. And just as the Supreme Court sent Congress back to the

drawing board, this court should send the Alabama Legislature back as well.[40]

Moreover, because these plans have not gone into effect, there is ample time for the Alabama Legislature to come up with plans that accede to the request made by all of Alabama's black legislators, a request that is not only a legitimate and laudable one but is, in fact, the only legitimate request that can be made absent current conditions reflecting otherwise: to carry out its decennial reapportionment, as required by one-person-one-vote, based more on traditional districting factors (such as respect for political subdivisions and precincts, compactness, contiguity, and incumbency) and based *far less on race.*

Fashioning and implementing such a remedy would not be difficult. Without a doubt, if, following the 2010 census, the Alabama Legislature had not used these naked racial quotas in redistricting for the House and Senate, the plans it would have adopted would not be the ones before us today. Therefore, my command to the State in redrawing the plans would be simple and direct: Get rid of racial percentages, that is, the naked racial quotas, that the State

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[40] Interestingly, the majority observes that "Governor Wallace and segregation are long gone, and Alabama has virtually eliminated any racial gap in voter registration or participation," citing to the State's evidence submitted in the Shelby County. *Ante* at 172. But this, if true, is exactly my point too. And my pointed question remains, Why these high racial percentages today? Why these racial quotas today?

incorrectly believed § 5 to require. In other words, while race and racial issues may be valid considerations, and may even be required under § 2 of the VRA, naked racial quotas (that is, racial line-drawing not rooted in and compelled by a sensitive assessment of current conditions) are unconstitutional.

Therefore, because the plans before this court rely on quotas to cabin individuals into districts based on the race of those individuals in an intentional, unjustified, and thus illegal manner, I cannot give the plans my imprimatur. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-691 (Three-Judge Court)
ALABAMA DEMOCRATIC CONFERENCE, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-1081 (Three-Judge Court)

FINAL JUDGMENT

(Filed Dec. 20, 2013)

In accordance with the prior proceedings, opinions, and orders of the court, it is the ORDER, JUDGMENT, and DECREE of the three-judge court that in (1) civil action 2:12-cv-691 judgment is entered in favor of Defendants – the State of Alabama, the Secretary of State of Alabama, Gerald Dial, and Jim McClendon – and against Plaintiffs – Alabama

Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner Jr., and Jiles Williams Jr. – and (2) in civil action 2:12-cv-1081, judgment is entered in favor of Defendants – the State of Alabama, the Secretary of State of Alabama, the Governor of Alabama, Gerald Dial, and Jim McClendon – and against Plaintiffs – the Alabama Democratic Conference, Framon Weaver Sr., Stacey Stallworth, Rosa Toussaint, and Lynn Pettway. Costs are taxed against Plaintiffs in civil action 2:12-cv-691 and in civil action 2:12-cv-1081.

The Clerk of the Court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE this 20th day of December, 2013.

/s/ W. Keith Watkins
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX

Supreme Court, U.S.
FILED
JAN 23 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 13-895

In The

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS et al.,

Appellants,

v.

THE STATE OF ALABAMA et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

APPENDIX VOLUME 2

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-691 (Three-Judge Court)
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-1081 (Three-Judge Court)

MEMORANDUM OPINION AND ORDER

(Filed Aug. 2, 2013)

On April 3, 2013, the State of Alabama and Beth Chapman, in her official capacity as Secretary of State of Alabama, filed a motion for a partial summary judgment against count three of the amended complaint of the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner Jr., and Jiles

Williams Jr. On April 17, 2013, the Black Caucus plaintiffs filed motions for this Court to reconsider our denial of their second motion for a partial summary judgment and for the entry of a permanent injunction. For the reasons explained in this memorandum opinion and order, we **GRANT IN PART** the motion for a partial summary judgment in favor of the State defendants as to the first claim in count three and **DISMISS** the second claim in count three for lack of subject matter jurisdiction. In the alternative, we **GRANT** a summary judgment in favor of the State defendants as to the second claim in count three. We **DENY** the Black Caucus plaintiffs' motion for reconsideration and **DENY AS MOOT** their motion for the entry of a permanent injunction.

I. BACKGROUND

This case concerns the redistricting of the Alabama Legislature, and this order concerns claims of partisan gerrymandering and a denial of equal protection. The Black Caucus plaintiffs contend that the new districts for the election of the Alabama Legislature violate their rights under the First and Fourteenth Amendments. And the Black Caucus plaintiffs allege that one key problem with the new districts involves the malapportionment of county residents in the districts of local delegations for various counties. To understand the context of those claims, we will explain the organization of the legislature, the most recent effort of the legislature to redistrict itself, and the procedural history of this litigation.

The legislative power of Alabama is vested in the Alabama Legislature, which consists of the Senate and the House of Representatives. Ala. Const. Art. IV, § 44. Members of the Legislature are elected on the first Tuesday after the first Monday in November, and they serve for terms of four years. *Id.* § 46.

Because all members of the Legislature are elected on the same day, each new four-year session of the Legislature begins with an organizational session. *Id.* § 48.01. At this organizational session, the only business that may be conducted is "the organization of the legislature, the election of officers, the appointment of standing committees of the senate and the house of representatives for the ensuing four years," and the certification of elections. *Id.* Each Legislature is free to adopt its own internal rules and committees for the facilitation of lawmaking. The current session of the Alabama Legislature employs standing committees to study the subject matter of legislation and make recommendations to the houses about bills, as well as a Rules Committee to determine the order of business in each house. But a bill cannot become law in Alabama until that bill has been approved by a majority of each house of the Legislature and signed by the Governor or approved again by a majority of the Legislature over the veto of the Governor. *Id.* Art. V, § 125.

Because the Constitution of Alabama limits the power of local governments, the Alabama Legislature is responsible for a significant amount of local legislation, and the current Legislature uses local delegations

to facilitate the passage of this legislation. Each house has similar, but not identical, customs for local bills.

All members of the Senate are members of local delegations for the counties that they represent. The local delegation of a particular county must approve local legislation before it can move forward to a local legislation committee and again before it can be sent to the floor. The local delegations of Jefferson County, Mobile County, and Madison County each have a standing local legislative committee made up of the same members as the local delegation, and the rest of the local delegations use another local legislative committee whose members are appointed. The latter committee does not vote on the local legislation; instead, the local delegations of the counties sign the legislation out of that committee. Although local legislation is often uncontested on the Senate floor as a matter of local courtesy, there is no Senate rule that requires deference to delegations. Any senator may oppose local legislation on the floor of the Senate. And on tax and alcohol related matters, Senate members routinely contest legislation for other localities.

All members of the House of Representatives too are members of local delegations for the counties that they represent. Each local delegation with more than five members has a corresponding standing committee in the House of Representatives to consider its local legislation, and a separate standing committee considers local legislation from all other delegations. A local delegation with more than five members must

approve local legislation by a majority vote before it is sent to the House floor, but a local delegation with fewer than five members must unanimously approve the bill before it is sent to the House floor. House members are free to oppose local legislation on the floor, but local legislation is often uncontested as a matter of courtesy. Although local legislation is often uncontested in the House of Representatives, legislators can and do deviate from this practice. House Rule 23 allows any member of the House of Representatives to file a contest on a local bill as long as he or she does so in written form with the Clerk. *See* Ala. H. Rule 23. If the member of the House of Representatives wishes to contest a bill for more than one day, that member can submit one letter and inform the Clerk each day that the contest is still active. While the bill is under contest, it cannot be presented to the full House, unless four/fifths of those present and voting suspend the rules to bring the bill to the floor or the rules committee places the bill on a special order calendar. Local legislation is not enacted until it receives a majority vote in both houses of the Alabama Legislature and is signed by the Governor.

The rules for local legislation, including the use of local delegations, are adopted in the organizational session held each quadrennium and can be modified at any time. At the end of a quadrennium, the rules and committees that protect the system of local delegation cease to exist until such time as the Legislature adopts a system of local delegation again. Although the rules for local legislation that have been

adopted by each Legislature have been fairly consistent over the last twenty years, new local legislative committees have been created. The House of Representatives has created new local delegation committees when new district lines have split counties so that at least five members of the Legislature represent voters of that county. And the Senate has increased the number of standing committees.

After the census in 2010 revealed the malapportionment of the Alabama Legislature, the Legislature created a Joint Legislative Reapportionment Committee to establish guidelines for new legislative districts. The guidelines provided that, "to ensure compliance with the most recent case law in this area and to eliminate the possibility of an invidious discriminatory effect caused by population deviations in a final [] redistricting plan, . . . individual district populations should not exceed a 2% overall range of population deviation." Guidelines Art. II, § 2(b), *available at* http://www.legislature.state.al.us/reapportionment/Guidelines.html. The Guidelines also provided that "[a] redistricting plan will not have either the purpose or the effect of diluting minority voting strength, shall not be retrogressive, and shall otherwise comply with Sections 2 and 5 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution" and that "[a]ll legislative and congressional districts will be composed of contiguous and reasonably compact geography." *Id.* Art. IV, §§ 2, 4. After public comment, the Legislature approved new district maps, and, on May

31, 2012, Governor Robert Bentley signed into law Acts 2012-602 and 2012-603, which established the new districts.

After Governor Bentley signed the Acts, the Black Caucus plaintiffs filed a complaint against the State and Chapman, in her official capacity as the Secretary of State of Alabama. The complaint asserted three counts: violation of the guarantee of one person, one vote under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 2; dilution and isolation of the strength of black votes in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Fourteenth Amendment, U.S. Const. Amend. XIV, and the Fifteenth Amendment, U.S. Const. Amend. XV; and partisan gerrymandering in violation of the First Amendment, U.S. Const. Amend. I. The Black Caucus plaintiffs moved for partial summary judgment and preliminary and permanent injunctive relief on count one of their complaint.

The State defendants filed a motion to dismiss or, in the alternative, to stay the action until the Attorney General of Alabama, Luther Strange, obtained either administrative or judicial preclearance of the new districts under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We granted the motion of the State defendants to stay the matter until either the Attorney General of the United States, Eric Holder, or the United States District Court for the District of Columbia decided whether to preclear the districts. After Attorney General Holder precleared the new

districts, we lifted the stay of the action and denied the motion to dismiss filed by the State defendants. The State defendants then filed an answer to the complaint and a motion for judgment on the pleadings with respect to all three counts.

After a hearing on the latter motions, another complaint was filed challenging the new districts. Demetrius Newton, the Alabama Democratic Conference, Stacey Stallworth, Framon Weaver Sr., Rosa Toussaint, and Lynn Pettway filed a complaint against the State; Bentley, in his official capacity as the Governor of Alabama; and Chapman, in her official capacity as the Secretary of State of Alabama. The Newton plaintiffs asserted three counts in their complaint: violation of section 2 of the Voting Rights Act; racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments; and violations of constitutional and statutory rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After the Newton action was assigned to this three-judge court, we determined that both the Black Caucus action and the Newton action involve common questions of law and fact and consolidated them to avoid unnecessary repetition and confusion. *See* Fed R. Civ. P. 42(a)(2).

On December 26, 2012, we denied the first motion for a partial summary judgment filed by the Black Caucus plaintiffs with respect to count one, granted the motion of the State defendants for judgment on the pleadings as to count one, denied the motion by the State defendants for judgment on the

pleadings as to count two, and dismissed without prejudice count three of the complaint filed by the Black Caucus plaintiffs. We granted the Black Caucus plaintiffs leave to amend their complaint "to allege more facts and constitutional grounds to support [their] claim of political gerrymandering and to identify a judicial standard by which we can adjudicate the claim."

The Black Caucus plaintiffs timely filed an amended complaint with a new count three entitled "Partisan Gerrymandering." The amended complaint identifies as the standard of adjudication for count three "that traditional or neutral districting principles may not be subordinated in a dominant fashion by either racial or partisan interests absent a compelling state interest for doing so, particularly where the traditional districting principle is embedded in the state constitution." The complaint alleges that the Acts were "designed to promote the agenda of the partisan majority to maximize the number of seats statewide that Republicans will hold in the Legislature" and that the Acts "dilut[e] the voting strength of county residents in electing the members of their local legislative delegations by unnecessarily splitting county boundaries and including in local legislative delegations legislators who are elected in part by voters residing in other counties." The complaint also alleges that a "county's local legislative delegation effectively controls most important local government policies."

The Black Caucus plaintiffs then filed a second motion for a partial summary judgment with respect to count three. On March 27, 2013, we denied the motion for a partial summary judgment. The Black Caucus plaintiffs responded to our denial of their motion with a motion to alter or amend our order. The Black Caucus plaintiffs argued that we failed to state a reason for our decision in contradiction of Federal Rules of Civil Procedure 56(a) and 52(a)(2). Although we denied the motion, we *sua sponte* vacated our previous order, again denied the motion for a partial summary judgment, and substituted a new memorandum opinion and order. We explained that the claim of partisan gerrymandering filed by the Black Caucus plaintiffs failed to provide a judicial standard for the adjudication of the claim and that, under any standard of adjudication, the Black Caucus plaintiffs failed to explain how they are entitled to a judgment in their favor as a matter of law. We also explained that the Black Caucus plaintiffs failed to establish the absence of a genuine issue of material fact.

On April 3, 2013, the State defendants moved for a partial summary judgment on count three, and made three arguments in support of their motion. First, the State defendants argued that the claim of partisan gerrymandering was "so closely related to the earlier county-splitting claim as to be another question of state law" that this Court lacks jurisdiction to consider. Second, the State defendants argued that the Black Caucus plaintiffs have still failed to

provide the court any administrable standard by which to assess their claim of partisan gerrymandering. Third, the State defendants argued that the decision of the Eleventh Circuit in *DeJulio v. Georgia,* 290 F.3d 1291 (11th Cir. 2002), establishes that the requirement of one person, one vote does not apply to local delegations in Alabama because they do not exercise "general governmental powers."

On April 17, 2013, along with their response to the motion for a partial summary judgment filed by the State defendants, the Black Caucus plaintiffs filed a motion to reconsider our denial of their second motion for a partial summary judgment and a motion for a permanent injunction. The Black Caucus plaintiffs argued that "[t]he equal protection rights of residents of any county are violated whenever *any* nonresidents are allowed to vote for the county's local delegation – unless the inclusion of those nonresidents is necessary to comply with statewide equal population requirements." The Black Caucus plaintiffs also argued that the Acts "unnecessarily allow [ ] nonresidents to dominate residents of a county," unnecessarily multiply the number of counties that members of the House and Senate represent, and dilute "[t]he voting strength of county residents whose House or Senate district lies entirely within the county . . . when compared with the voting strength of residents of the same county whose districts extend out of the county." And the Black Caucus plaintiffs argued that this matter is distinguishable from the decision of the Eleventh Circuit in *DeJulio.*

In reply to the Black Caucus plaintiffs, the State defendants urged us to grant their motion for a partial summary judgment and deny the motions of the Black Caucus plaintiffs for reconsideration and for permanent injunction for the same reasons identified in their initial brief.

At a hearing on the pending motions, the Black Caucus plaintiffs announced for the first time that count three encompassed two claims: an as-applied challenge for partisan gerrymandering in violation of the First Amendment and a facial challenge to the districts based on the Equal Protection Clause of the Fourteenth Amendment. The Black Caucus plaintiffs argued that the Acts violate the Equal Protection Clause because the districts are apportioned to satisfy the requirement of one person, one vote for the Legislature as a whole, but not for the local delegations. And the Black Caucus plaintiffs argued that the districts violate the First Amendment because the Legislature allegedly acted with partisan motives when it approved the districts that dilute the votes of county voters for their local delegations. The Black Caucus plaintiffs explained that their motion for reconsideration concerns only the facial challenge under the Equal Protection Clause, not the as-applied challenge for partisan gerrymandering, even though the State defendants seek a partial summary judgment against all of count three.

Based upon the arguments made by the Black Caucus plaintiffs at the hearing, we ordered the parties to submit simultaneous briefs on the

justiciability of the facial challenge to the districts based on the Equal Protection Clause of the Fourteenth Amendment. In the order, we asked the parties whether the facial challenge to the districts was ripe for our review or whether it was contingent on the decision of the next Legislature to adopt a system of local delegations at the next organizational session. We also questioned whether the Black Caucus plaintiffs could establish Article III standing to bring its claim. And we invited the parties to submit any evidence that might help us to resolve these jurisdictional questions.

The Black Caucus plaintiffs argued that the claim under the Equal Protection Clause in count three is ripe. With respect to ripeness, the Black Caucus plaintiffs asserted that their claim about the interaction of the district lines with the local delegation system is not contingent on future events because "[n]o House or Senate rule or committee structure or assignments adopted in the 2015 organizational session of the Legislature can compel an end to – or even any change in – the local delegation customs the parties now agree are in place." And the Black Caucus plaintiffs argued that they will suffer hardships as voters if judicial review of the new district lines is delayed because their votes for county delegations will be diluted. But the Black Caucus plaintiffs offered no evidence to support their assertions that the local delegations exist continuously without any action from the Legislature at the organizational session.

The Black Caucus plaintiffs also argued that they had standing to bring the claim. The Black Caucus plaintiffs explained that their injury-in-fact would be the dilution of their votes for county delegations when the new districts are used. The Black Caucus plaintiffs disclaimed any injury that they as legislators or candidates might experience. They argued that the vote dilution of which they complain is "directly traceable to the county-blasting districts" and will be redressed by an injunction to prohibit use of the new districts.

The State defendants argued that the claim under the Equal Protection Clause is not ripe. The State defendants explained that the injury of which the Black Caucus plaintiffs complain – the interaction of the new district lines with the local delegation system – is contingent upon the decision of the next Legislature to adopt a local delegation system at its organizational session. And the State Defendants submitted the deposition testimony of the Clerk of the House and the Clerk of the Senate to establish that the Alabama House and Senate adopt their committee rules at the organizational session that follows each election. As an example of the ways in which the rules of the Legislature can change dramatically between organizational sessions, the State Defendants submitted copies of the rules adopted in the 1995 and 1999 organizational sessions to establish that the Democratic-controlled Senate in 1999 stripped the newly elected Republican Lieutenant

Governor of the powers that his predecessor had exercised.

The State defendants also argued that the Black Caucus plaintiffs lacked standing to bring the claim under the Equal Protection Clause. To the extent that the Black Caucus plaintiffs had tried to assert legislative standing, the State defendants explained that the argument would fail because none of the legislators have a personal stake in the number of counties they represent. *See Raines v. Byrd,* 521 U.S. 811, 821, 829, 117 S. Ct. 2312, 2318, 2322 (1997). The State defendants also argued that the Black Caucus plaintiffs, whether suing in their individual or legislative capacities, lack a concrete, particularized injury-in-fact because no local delegation system has been adopted for the Legislature that will be elected in 2014 and we cannot know whether the Legislature will adopt a local delegation system and, if adopted, what form it would have. And the State defendants argued that the harm alleged by the Black Caucus plaintiffs is not fairly traceable to the districts because the harm is caused by the local delegation system. Finally, the State defendants contended that "[o]nly a different system for local legislation would cure the alleged injury" because any plan that would satisfy the requirement of one person, one vote for the legislature as a whole would require the splitting of counties.

II. DISCUSSION

We grant a summary judgment in favor of the State defendants and against the claim of partisan gerrymandering, *see* Fed. R. Civ. P. 56(a), and we dismiss for lack of subject matter jurisdiction the claim under the Equal Protection Clause. The Black Caucus plaintiffs have failed to provide a judicial standard by which we can adjudicate their claim of partisan gerrymandering. And we lack jurisdiction to consider the claim under the Equal Protection Clause both because the Black Caucus plaintiffs lack standing under Article III and because the claim is not ripe. In the alternative, controlling Eleventh Circuit precedent establishes that the challenge under the Equal Protection Clause to the interaction of the districts with the local delegation system fails as a matter of law.

A. The Black Caucus Plaintiffs Have Failed to Provide a Standard for the Adjudication of Their Claim of Partisan Gerrymandering.

The Black Caucus plaintiffs have failed to provide us what we sought when we dismissed their claim of partisan gerrymandering without prejudice and gave them leave to amend their complaint: "a judicial standard by which we can adjudicate the claim." Where a court "ha[s] no standard by which to measure the burden [plaintiffs] claim has been imposed on their representational rights, [plaintiffs] cannot establish that the alleged political classifications burden those same rights." *Vieth v. Jubelirer*,

541 U.S. 267, 313, 124 S. Ct. 1769, 1796 (2004) (Kennedy, J., concurring in the judgment). In their amended complaint, the Black Caucus plaintiffs identify the following standard of adjudication for their First Amendment claim: "[T]raditional or neutral districting principles may not be subordinated in a dominant fashion by either racial or partisan interests absent a compelling state interest for doing so, particularly where the traditional districting principle is embedded in the state constitution." But we cannot adjudicate the claim of partisan gerrymandering under this standard.

The standard proposed by the Black Caucus plaintiffs is inconsistent with the clear statement of Justice Kennedy in his controlling concurrence that a claim for partisan gerrymandering should not be evaluated under the standard used for a claim of racial gerrymandering. Claims of racial gerrymandering "implicate a different inquiry" from claims of partisan gerrymandering because "[r]ace is an impermissible classification" and political belief is not. *Vieth,* 541 U.S. at 307, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment). "A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Id.* That determination "must rest [ ] on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.; see also id.* at 286, 124 S. Ct. at 1781 (plurality opinion) ("Determining

whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it."). But the standard of adjudication proposed by the Black Caucus plaintiffs makes no distinction between racial and political gerrymandering. Indeed, the decisions that the Black Caucus plaintiffs offered in support of their standard involved allegations of racial, not political, gerrymandering. *Bartlett v. Strickland,* 556 U.S. 1, 6, 129 S. Ct. 1231, 1238 (2009); *Shaw v. Reno,* 509 U.S. 630, 636 113 S. Ct. 2816, 2821 (1993). And the standard proposed by the Black Caucus plaintiffs bears a striking similarity to one of the standards borrowed from the context of racial gerrymandering and rejected by five justices of the Supreme Court in *Vieth. See Vieth,* 541 U.S. at 284, 124 S. Ct. at 1780 (plurality opinion) (rejecting as vague and unworkable a proposed standard under which a plaintiff "must show that the mapmakers acted with a *predominant intent* to achieve partisan advantage [statewide], which could be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage"); *id.* at 308, 124 S. Ct. at 1794 (Kennedy, J., concurring in the judgment).

The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of

adjudication for their claim of partisan gerrymandering is "unknowable." When asked at the hearing how we could "allow a claim to go forward that no one understands" and for which the Black Caucus plaintiffs "don't even know what evidence [they can] marshal to either support it or reject it," the Black Caucus plaintiffs responded that they "simply rely on the credibility of Justice Kennedy's suggestion that lower courts explore what facts might constitute a First Amendment claim." But relying on that suggestion is not enough. The Black Caucus plaintiffs bear the burden of providing us a standard to adjudicate their First Amendment claim under count three. Because they have failed to do so, they have failed to state a claim upon which relief can be granted, *see Vieth,* 541 U.S. at 313, 124 S. Ct. at 1796-97, and the State defendants are entitled to a partial summary judgment against the first claim in count three, *see* Fed. R. Civ. P. 56(a).

B. We Lack Subject Matter Jurisdiction to Review the Black Caucus Plaintiffs' Theory Under the Fourteenth Amendment.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Raines,* 521 U.S. at 818, 117 S. Ct. at 2317 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S. Ct. 1917, 1924 (1976)). Because we have "an independent obligation to examine [our] own jurisdiction," we

asked the parties to submit briefs on the justiciability of the claim brought by the Black Caucus plaintiffs under the Equal Protection Clause. *United States v. Hays,* 515 U.S. 737, 742, 115 S. Ct. 2431, 2435 (1995) (quoting *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230-31, 110 S. Ct. 596, 607-08 (1990)). Based on the arguments made by the parties and the evidence in the record, we must dismiss the claim under the Equal Protection Clause as nonjusticiable.

We conclude that we lack subject matter jurisdiction to consider the Black Caucus plaintiffs' claim under the Equal Protection Clause for two separate reasons. First, the claim under the Equal Protection Clause is not ripe for review. *See United Pub. Workers of Am. v. Mitchell,* 330 U.S. 75, 89-90, 67 S. Ct. 556, 564 (1947). Second, the Black Caucus plaintiffs do not meet "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

1. The Claim Under the Equal Protection Clause Is Not Ripe.

"When determining [whether] a claim is ripe for judicial review, we consider both constitutional and prudential concerns." *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1335, 1339 (11th Cir. 2005). "The ripeness doctrine is one of the several 'strands of justiciability doctrine . . . that go to the heart of the Article III case or controversy requirement.'" *Mulhall v. UNITE HERE Local 355,* 618 F.3d 1279, 1291 (11th

Cir. 2010) (quoting *Harrell v. Fla. Bar,* 608 F.3d 1241, 1246 (11th Cir. 2010)). "Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies of sufficient concreteness to evidence a ripeness for review." *Digital Properties, Inc. v. City of Plantation,* 121 F.3d 586, 589 (11th Cir. 1997); *see also United Pub. Workers,* 330 U.S. at 89-90, 67 S. Ct. at 564 ("The power of courts . . . to pass upon the constitutionality of acts . . . arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."). "Even when the constitutional minimum has been met, however, prudential considerations may still counsel judicial restraint." *Digital Properties,* 121 F.3d at 589 (quoting *Action Alliance of Senior Citizens v. Heckler,* 789 F.2d 931, 940 n. 12 (D.C. Cir. 1986)). "The ripeness doctrine keeps federal courts from deciding cases prematurely, and protects them from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *United States v. Rivera,* 613 F.3d 1046, 1050 (11th Cir. 2010) (internal quotation marks, citations, and alterations omitted).

"To determine whether a claim is ripe, we assess both the *fitness* of the issues for judicial decision and the *hardship* to the parties of withholding judicial review." *Harrell,* 608 F.3d at 1258. "The fitness prong is typically concerned with questions of 'finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be

sufficiently developed.'" *Id.* (quoting *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995)). "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Id.*

The claim under the Equal Protection Clause in count three of the amended complaint of the Black Caucus plaintiffs is not yet ripe for judicial review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States,* 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 3333 (1985)). Under the Constitution of Alabama, a newly elected Legislature must convene on the second Tuesday in the January immediately following the general election to organize the Legislature for the next four years. Ala. Const. Art. IV, § 48.01; *see also* Rules of the Senate of Alabama, Alabama State Senate, *available at* http://www.legislature.state.al.us/senate/senaterules/senaterulesindex.html (last visited June 11, 2013) (explaining that the rules adopted by the Legislature elected in 2010 govern only the 2011-2014 legislative quadrennium). The Black Caucus plaintiffs allege that the redistricting Acts violate the Equal Protection Clause because of the way in which they interact with the system of local delegations, but that system has not been adopted for the Legislature that would be elected in 2014 in accordance with the new district maps. And only the newly elected

Legislature will be able to adopt that system. Because we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured, the claim under the Equal Protection Clause in count three rests on contingent future events and is not sufficiently concrete and definite to be fit for judicial review. And to withhold consideration of the claim at present will not cause the parties significant hardship because the use of the new districts will not, by itself, cause any harm to the interests of the Black Caucus plaintiffs. The harm of which the Black Caucus plaintiffs complain is dependent upon the future decision of the Alabama Legislature to adopt a system of local delegations.

The Black Caucus plaintiffs argue that the local delegation system has existed continuously from time immemorial, but the undisputed record evidence forecloses that argument. The Black Caucus plaintiffs bear the burden to establish our jurisdiction over their claims, *McCormick v. Aderholt,* 293 F.3d 1254, 1257 (11th Cir. 2002), and "[i]n response to a summary judgment motion, [they] can no longer rest on [ ] 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. R. Civ. P. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992) (internal quotation marks omitted). The State defendants have submitted sworn testimony from the clerks of both houses of the Alabama Legislature that

the rules of the Legislature, including those governing local legislative delegations, are adopted each quadrennium at the organizational session. The Clerk of the House testified in his deposition that the rules and committees for the Senate "are formed in every organizational session by the speaker of the House and adopted by the House when they adopt the rules" and that the current rules and committees will expire at the end of the current Legislature. The Clerk of the Senate also testified in his deposition that the Senate "adopt[s][its] operational rules during the organizational session at the beginning of each quadrennium." Although both the Clerk of the House and the Clerk of the Senate acknowledged that the rules for local legislation have rarely changed, both agreed that the rules are adopted in the organizational session and apply only to the sitting Legislature. The next legislature will establish its own rules and committees in January 2015. And the Black Caucus plaintiffs have submitted no evidence to contradict this testimony, but have relied solely on bald assertions in their complaint and in their brief about the continuous existence of the local delegations. Based on the undisputed record evidence, we must conclude that the claim under the Equal Protection Clause, which rests upon the interaction between the districts and the local delegation system, is contingent upon the future adoption of such a system and, as a result, is not ripe for judicial review.

Our dissenting colleague argues that the record, viewed in the light most favorable to the Black Caucus

plaintiffs, would support the conclusion that the local delegations exist as a matter of custom and that the Legislature creates only the rules and standing committees during its organizational session, Dissenting Op. at 26, but the rules and standing committees are the formal governmental mechanisms through which the local delegations operate. For example, all local legislative bills must pass through those standing committees, and it is only by the agreement of the standing committees that the local delegations are able to serve as effective gatekeepers for local legislation. To the extent that the entire theory advanced by the Black Caucus plaintiffs relies on the ability of local delegations to serve as gatekeepers for local legislation, that ability is dependent upon and enshrined in the formal rules and standing committees. And the unrebutted record establishes that those rules and standing committees are created in the organizational session held each quadrennium.

Our dissenting colleague argues, apparently in the alternative, that "the ripeness inquiry this court faces is whether it is sufficiently likely that the State will carry out the anticipated conduct that the plaintiffs contend will cause unconstitutional vote dilution," Dissenting Op. at 17, but that argument fails. Our dissenting colleague relies for this substantial-likelihood test on a decision of the Eleventh Circuit that spoke to an entirely different circumstance than the one we face here. *See Mulhall,* 618 F.3d at 1291-92. In *Mulhall,* the Eleventh Circuit faced a claim that was already ripe for review because the defendant

was under the compulsion of an arbitral award to take the action that would injure the plaintiff. *Mulhall,* 618 F.3d at 1292; *see also United States v. Zinn,* 321 F.3d 1084, 1088 (11th Cir. 2003) (holding that a claim was ripe where the controversy concerned a condition of a defendant's supervised release mandated by the district court in its final and immediately appealable sentencing order). And the question on appeal was whether the outcome of another lawsuit was likely to "*deprive* the plaintiff of an injury." *Mulhall,* 618 F.3d at 1291-92. But the question we face with respect to the claim advanced by the Black Caucus plaintiffs is whether the injury alleged by the Black Caucus plaintiffs will occur at all, not whether an injury that has already occurred is likely to be cured by some future contingency. Our dissenting colleague misunderstands our opinion when he suggests that the future contingency with which we are concerned is whether the State will "abolish or materially alter the system." *See* Dissenting Op. at 21.

2. The Black Caucus Plaintiffs Lack Article III Standing.

Another "element of the case-or-controversy requirement is that [the plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines,* 521 U.S. at 818, 117 S. Ct. at 2317. "The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry 'often turns on the nature and source of the claim asserted.'" *Id.* (quoting *Warth v. Seldin,* 422

U.S. 490, 500, 95 S. Ct. 2197, 2206 (1975)) (internal citation omitted). "[S]tanding is perhaps the most important jurisdictional doctrine and, as with any jurisdictional requisite, we are powerless to hear a case when it is lacking. Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 974-975 (11th Cir. 2005) (internal quotation marks and citations omitted).

To have standing under Article III, a plaintiff must establish three elements. "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S. Ct. at 2136 (internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* at 560-61, 112 S. Ct. at 2136 (internal quotation marks and alterations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561, 112 S. Ct. at 2136 (internal quotation marks omitted).

The Black Caucus plaintiffs cannot satisfy any of these elements for their claim under the Equal Protection Clause. And the failure to satisfy any of these elements is fatal to the justiciability of their claim.

The Black Caucus plaintiffs cannot establish an actual or imminent injury, causation, or redressability.

The Black Caucus plaintiffs cannot establish the existence of an injury-in-fact for many of the same reasons that their claim under the Equal Protection Clause is not ripe. "A plaintiff is deemed to have suffered an injury in fact – 'an invasion of a judicially cognizable interest' – when he demonstrates a harm that is '(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetica[illegible]" *Elend v. Basham,* 471 F.3d 1199, 1207 (11th Cir. 2006) (quoting *31 Foster Children v. Bush,* 329 F.3d 1255, 1263 (11th Cir. 2003)). "If an action for prospective relief is not ripe because the factual predicate for the injury has not fully materialized, then it generally will not contain a concrete injury requisite for standing." *Id.* at 1205. Although "there is no per se rule denying standing to prevent probabilistic injuries," *Fla. State Conference of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1162 (11th Cir. 2008), "the threatened future injury must pose a 'realistic danger' and cannot be merely hypothetical or conjectural," *id.* at 1161. When a threatened future injury is dependent upon "conjecture about how individuals will intentionally act in the future," *id.* at 1163, that injury will be "cast . . . into the realm of conjecture and speculation," *id.* at 1162. The Black Caucus plaintiffs argue that the implementation of the redistricting Acts during the 2014 election will violate their rights under the Equal Protection Clause because their votes for their county delegation will be diluted by the

votes of nonresidents. But no system of local delegation has been adopted for the Legislature that will be elected in 2014, and the injury alleged by the Black Caucus plaintiffs is dependent entirely on the independent action of a future Alabama Legislature that will be elected in accordance with the independent actions of over one million voters. The threatened injury "depend[s] on conjecture about how [at least two different groups of] individuals will intentionally act in the future" – voters and the legislators who will be elected in 2014. Viewing the evidence in the light most favorable to the Black Caucus plaintiffs, we cannot conclude that the Black Caucus plaintiffs have met their burden to establish the existence of an injury-in-fact. *Compare Henderson v. Stalder,* 287 F.3d 374, 380 (5th Cir. 2002) (finding that an injury was "based in conjecture" and insufficient to support standing when it was based solely on how the plaintiffs expected the members of a Choose Life Council to administer the Choose Life Fund based on the Christian ideologies held by those members) *with Awad v. Ziriax,* 670 F.3d 1111, 1123-24 (10th Cir. 2012) (finding that an injury was not conjectural or hypothetical when it was based on a constitutional amendment in Oklahoma already passed by the Legislature and approved by the voters and subject only to certification by the state election board).

Our dissenting colleague argues that the Black Caucus plaintiffs have established the existence of an injury-in-fact because he views it as likely that the future Alabama Legislature will adopt a system of

local delegations. Dissenting Op. at 34. He bases that conclusion on the affidavits offered by the State defendants that the rules governing local legislation have been adopted by each legislature over the past 40 years in approximately the same form, *id.* at 18; the absence of evidence that anyone "has expressed a desire to abolish or materially alter the system," *id.* at 21; and his own theory that it would be potentially illegal under the Voting Rights Act for the Alabama Legislature to not adopt a system of local delegation because "it would have the effect of transferring power away from the black legislators who represent the majority-black counties and to the white majority of the State as a whole," *id.* at 23.

Our dissenting colleague's analysis is fundamentally flawed for at least two reasons. First, our dissenting colleague engages in unwarranted speculation about the legality of the decision of a future Alabama Legislature not to adopt a system of local delegations even though no federal court has ever considered – let alone decided – that issue. And second, our dissenting colleague incorrectly weighs the evidence in the record. Although the record contains evidence that the Alabama Legislature has adopted similar rules governing local delegations for at least the last thirty years, the record also contains evidence that the Alabama Legislature has altered longstanding rules in response to political changes in memberships. Notably, the Democratic majority in the Alabama Senate elected in November 1998 dramatically reduced the power of the Lieutenant

Governor when a Republican was elected to that position. Contrary to the suggestion of our dissenting colleague, the requirement that we view the evidence in the light most favorable to the Black Caucus plaintiffs does not require us to disregard this unrebutted evidence about a jurisdictional fact, but instead to weigh it against the other evidence in the record. And, contrary to the suggestion of the dissent, the absence of evidence does not weigh in favor of the Black Caucus plaintiffs. The Black Caucus plaintiffs bear the burden to put forth affirmative evidence in the record to establish their standing, and we invited them to do so. But the Black Caucus plaintiffs instead rested on their bare allegations and offered us no evidence. The evidence presented by the State defendants, when viewed in the light most favorable to the Black Caucus plaintiffs, establishes the absence of an actual, not conjectural or hypothetical, injury-in-fact.

The Black Caucus plaintiffs also cannot satisfy the second element of standing because the allegedly unconstitutional interaction between the redistricting Acts and the local delegations is not fairly traceable to the implementation of the redistricting Acts. Standing requires "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan,* 504 U.S. at 560, 112 S. Ct. at 2136 (quoting *Simon v. E. Ky. Welfare Rights. Org.*, 426

U.S. 26, 41-42, 96 S. Ct. 1917, 1926 (1976)). The Black Caucus plaintiffs argue that the redistricting Acts violate the Equal Protection Clause when they provide for the election of legislators who, in turn, represent unequal numbers of county voters in the local delegations, but the redistricting Acts do not create or otherwise provide for the local delegations. Only the next Alabama Legislature can create the system of local delegations. Because the constitutional injury alleged by the Black Caucus plaintiffs under the Equal Protection Clause can arise only if the next Alabama Legislature adopts a system of local delegations at its organizational session, the injury of which they complain is not "fairly traceable" to the State defendants' enforcement of the redistricting Acts.

Our dissenting colleague argues that "[t]he injury alleged in this case is caused by the redistricting plans as much as it is by the rules affording all Local Delegation members equal power," Dissenting Op. at 36, but that argument fails. Although "the fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing," it may make it "substantially more difficult . . . to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin,* 422 U.S. 490, 504-05, 95 S. Ct. 2197, 2208 (1975). "[The Black Caucus plaintiffs] must allege facts from which it reasonably could be inferred that, absent the [redistricting plans], there is a substantial probability that [their rights to elect representatives for their local

delegations in accordance with the requirement of one person, one vote would not have been infringed] and that, if the court affords the relief requested, the asserted [infringement] of [the rights of the Black Caucus plaintiffs] will be removed." *See id.* at 504, 95. S. Ct. at 2208. But the Black Caucus plaintiffs cannot make this showing because, even if the Legislature had adopted their proposed plans or maintained the malapportioned plans from 2000, the local delegations would still not be elected in accordance with the requirement of one person, one vote. The Black Caucus plaintiffs, who bear the burden to establish our jurisdiction, have submitted no evidence that it would even be possible for the Legislature to adopt districts that would elect legislators in accordance with the requirement of one person, one vote for both the Alabama Legislature and the local delegations.

The Black Caucus plaintiffs also cannot satisfy the third element of standing because an injunction to prevent the use of the redistricting Acts would not remedy the injury caused by the adoption of a local delegation system at a future organizational session of a Legislature elected in accordance with different district maps. For an injury to be redressable, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 561, 112 S. Ct. at 2136 (quoting *E. Ky. Welfare Rights,* 426 U.S. at 38, 43, 96 S. Ct. at 1924, 1926). As the Eleventh Circuit has explained, "Redressability is established when a favorable decision would amount to a significant

increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1303-04 (11th Cir. 2011). The only remedy sought by the Black Caucus plaintiffs is an injunction to prevent the use of the new district maps. The Black Caucus plaintiffs have repeatedly asked us not to enjoin the use of local delegations. At oral argument, the Black Caucus asserted that such an injunction "would fly squarely in the face of *DeJulio*." And in their brief on justiciability, the Black Caucus plaintiffs contended that "[a]ny change in the local delegation customs would not be desirable and might be unlawful." But an injunction to prevent the use of the redistricting acts would not "amount to a significant increase in the likelihood" that the Black Caucus plaintiffs' votes for the members of their local delegations would satisfy the requirement of one person, one vote. Neither the Acts, nor the proposed plans of the Black Caucus plaintiffs, nor the districts created in 2002 satisfy that requirement, and no party has contended that it would be possible to create a plan that is equitably apportioned at both the statewide and local delegation levels.

We also could not enjoin the Legislature from adopting a system of local delegation because the presently unknown officers of the next legislature are not parties to this appeal. *See Lujan*, 504 U.S. at 568-69, 112 S. Ct. at 2140-41 (explaining that "redress of the only injury in fact respondents complain of requires action (termination of funding until consultation)

by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action" because the agencies were not parties in the matter). The only official who is a named defendant in this action is Beth Chapman, in her official capacity as Secretary of State, who is not responsible for or in any way connected to the decision of the Legislature to adopt a local delegation system. And for the same reasons described above, an injunction to prevent the use of the new districts would not redress an injury caused by the failure to elect the members of the local delegations in accordance with the requirement of one person, one vote.

Our dissenting colleague argues that this claim is redressable because "a redistricting remedy by itself could remedy the one-person, one-vote violation in at least some Local Delegations," Dissenting Op. at 36, but a failure to comply with the requirement of one person, one vote is not the sort of injury that can be redressed by partial compliance. Unlike global warming or illegal immigration, both of which could be somewhat ameliorated by judicial action, *see Massachusetts v. EPA,* 549 U.S. 497, 526, 127 S. Ct. 1438, 1458 (2007); *Chiles v. United States,* 69 F.3d 1094, 1096 (11th Cir. 1995), a governmental body is either elected in accordance with the requirement of one person, one vote, or it is not. No court has held that partial compliance can be sufficient to redress an injury caused by inequitable apportionment.

And our dissenting colleague's view of redressability is logically inconsistent with the position he takes with respect to ripeness. Our dissenting colleague would rule that the claim under the Equal Protection Clause is ripe because "[t]he evidence overwhelmingly indicates that the Local Delegations system will almost certainly continue to exist with Alabama's next Legislature," Dissenting Op. at 28, and because any deviation from that local delegation system "would raise serious concerns under the Voting Rights Act," *id.* at 23. But our dissenting colleague also contends that a decree from our court that the redistricting acts violate the requirement of one person, one vote because of the local delegation system "would alter legal duties such that the injury would be remedied in part (that is, in some Local Delegations), and, two, the practical consequences of the decree would be a significant increase in the likelihood that the injury would be remedied in full (that is, in all Local Delegations acrosst eh [sic] State)." *Id.* at 38 (internal quotation marks omitted). We do not understand, nor do we expect that the State defendants would understand, how they could remedy the injury alleged by the Black Caucus plaintiffs when, on the one hand, no party has offered any plan that would satisfy the requirement of one person, one vote for both the Legislature and the local delegations, and, on the other hand, any elimination of the local delegations system would be "potentially unlawful."

Although we conclude that the claim under the Equal Protection Clause of count three is non-justiciable, local delegations in Alabama are not insulated from judicial review. The Black Caucus plaintiffs could have sued the officers of the Alabama Legislature to challenge the current system of local delegations. *See DeJulio,* 290 F.3d at 1292-3. And, if the next Legislature were to adopt a system of local delegations, the Black Caucus plaintiffs could then challenge that system and seek to enjoin its use. That challenge would be brought before a single-judge district court, with review in the Eleventh Circuit, not before a three-judge district court. *See* 28 U.S.C. § 2284. But a challenge to hypothetical local delegations cannot be brought as a challenge to the redistricting Acts.

C. In the Alternative, the Black Caucus Plaintiffs' Theory Under the Fourteenth Amendment Fails Under Binding Eleventh Circuit Precedent.

We also conclude, in the alternative, that the State defendants have established that they are entitled to a partial summary judgment against the second claim in count three. The second claim presents a facial challenge under the Equal Protection Clause based on the interaction between the local legislative system of Alabama and the voting districts for the Legislature as a whole. At the hearing on the pending motions, the Black Caucus plaintiffs alleged that, because the districts are apportioned to satisfy

the requirement of one person, one vote only for the Legislature as a whole, "the[] redistricting acts dilute[] the votes of county voters within [] count[ies] [] governed by a local legislative delegation."

As with their claim under the First Amendment, the Black Caucus plaintiffs have failed to identify the constitutional standard that we should employ to adjudicate this claim under the Equal Protection Clause. The Black Caucus plaintiffs argue that, when a state enacts voting districts that elect members "for both the state legislature and for local legislative delegations, which exercise general governing authority over counties, the state can deviate from the principle of one-person, one-vote for the local delegations only to the extent that such deviations are necessary to comply with one-person, one-vote . . . for the legislature as a whole." But the Black Caucus plaintiffs fail to define the word "necessary" or provide any other standard with which we could adjudicate this claim. To the extent that the Black Caucus plaintiffs argue that a deviation is "unnecessary" unless it is based on the whole-county provisions of the Alabama Constitution, we rule, as we did when we dismissed count one of the initial complaint, that we lack the subject-matter jurisdiction to entertain a claim that state officials violated state law. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 117, 104 S. Ct. 900, 917 (1984). And the Black Caucus plaintiffs have not explained why, if the requirement of one person, one vote applies to the

election of local delegations, the rights of county voters should be subrogated to the rights of state voters.

Controlling Eleventh Circuit precedent also establishes that the local delegations in Alabama are not subject to the requirement of one person, one vote. Sitting as a three-judge district court within the Eleventh Circuit, we are bound by Eleventh Circuit precedent. And the decision in *DeJulio* establishes that local delegations in Alabama do not exercise general governmental functions and, as a result, are not subject to the requirement of one person, one vote. *See* 290 F.3d at 1296. But even if we were not bound by *DeJulio,* we would conclude that local delegations in Alabama are not subject to the requirement of one person, one vote.

1. This Court Is Bound by Eleventh Circuit Precedent.

It is well settled that we are bound by Eleventh Circuit precedent when we sit as a three-judge district court. Three-judge district courts within the former Fifth Circuit have so held. *See Ala. NAACP State Conf. of Branches v. Wallace,* 269 F. Supp. 346, 350 (M.D. Ala. 1967) (three-judge court) ("It is the clear duty of this [three-judge] district court to follow the decision of our Court of Appeals"); *Willis v. Pickrick Rest.,* 231 F. Supp. 396, 400 (N.D. Ga. 1964) (three-judge court) (noting that Fifth Circuit decisions are binding on a three-judge district court). And the

former Fifth Circuit reasoned that three-judge courts are bound by decisions of the circuit court. *See Finch v. Miss. State Med. Ass'n, Inc.*, 585 F.2d 765, 773 (5th Cir. 1978) (explaining that "[i]n *Athanson v. Grasso*, the three-judge court was required to analyze carefully the interpretation placed upon *Allen* in City *of New York* and *Aguayo* because, as a district court within the Second Circuit, it was bound to follow the law of the circuit" (citation omitted)).

Although our dissenting colleague suggests that there exists some debate about this issue, *see* Dissenting Op. at 101 n.13, he does not deny that no three-judge district court outside of the Eleventh Circuit has ever held that it is not bound by the precedents of its circuit court. Three-judge district courts outside of this circuit instead have repeatedly held that they are bound by the precedents of their circuit courts. *See Parker v. Ohio*, 263 F. Supp. 2d 1100, 1105 (S.D. Ohio 2003) (three-judge court) ("While plaintiffs are correct that the First Circuit and the Supreme Court have not yet ruled on influence districts, we are bound by precedent in this circuit."); *Baksalary v. Smith*, 579 F. Supp. 218, 226 n.13 (E.D. Pa. 1984) (three-judge court) ("We [ ] feel ourselves bound not only by pertinent decisions of the Supreme Court, but also by pertinent decisions of the Court of Appeals for the Third Circuit."); *Russell v. Hathaway*, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (three-judge court) ("A three-judge court is bound by apposite decisions of the Court of Appeals for its circuit. The addition by Congress in the three-judge court acts of a second

district judge and a Circuit Judge together with direct appeal to the Supreme Court was not a grant of authority with elevated precedential stature but a withdrawal of power from a single judge."); *Athanson v. Grasso,* 411 F. Supp. 1153, 1157 (D. Conn. 1976) (three-judge court) ("As a district court, although composed of three judges, we are required to follow the law of our own circuit insofar as it is pertinent."); *Hamar Theatres, Inc. v. Cryan,* 390 F. Supp. 510, 512 (D.N.J. 1974) (three-judge court) ("We, as a district court, albeit a Three-Judge Court, are similarly bound by the precedent of *Cine-Com,* a Court of Appeals decision in this Circuit." (citations omitted)); *Wilczynski v. Harder,* 323 F. Supp. 509, 513 n.8 (D. Conn. 1971) (three-judge court) ("Sitting as a district court, this panel is bound by decisions of the court of appeals for this circuit."). And both the Second and Fourth Circuits have suggested that three-judge district courts within their circuits are bound by the precedent of their respective circuits. *See Lewis v. Rockefeller,* 4[illegible] F.2d 368, 371 (2d Cir. 1970) ("[E]ven if a three-judge court were to be convened here, it would sit as a district court and be bound by the decision of this court in [a previous Second Circuit decision]."); *Jacobs v. Tawes,* 250 F.2d 611, 614 (4th Cir. 1957) ("The court of three judges is not a different court from the District Court, but is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made." (internal citation omitted)).

The settled view that three-judge district courts are bound by circuit precedent is consistent with the structure of a three-judge district court. 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, & VIKRAM DAVID AMAR, Federal Practice and Procedure § 4235, at 224 (3d ed. 2007) ("Far the more common view . . . is that the three-judge court is sitting as a district court and is bound by decisions of the court of appeals for its circuit."). A three-judge district court is still a district court within the ordinary hierarchical structure of the federal judiciary. "Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez v. Automatic Emp. Credit Union,* 419 U.S. 90, 97, 95 S. Ct. 289, 294 (1974). For this reason, the Supreme Court has refused to exercise mandatory appellate review over decisions of three-judge courts that "den[y] a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio.*" *Id.* at 101, 95 S. Ct. at 296. Instead, the Court has required appellate review of those decisions by the circuit courts in which those three-judge district courts were convened. *Id.* Because circuit courts can review some decisions of three-judge district courts, it would be illogical to contend that three-judge district courts are not bound by circuit precedent on at least some issues. And because no clear line can be drawn between precedents that are

binding and those that are not, we accept the settled view that a three judge district court convened within the Eleventh Circuit is, like all other district courts within the circuit, bound by circuit precedent.

2. The Decision of the Eleventh Circuit in *DeJulio* Forecloses the Challenge to the Acts Based on the Dilution of County Voters in the Election of Local Delegations.

Under binding Eleventh Circuit precedent, the equal protection claim in count three fails as a matter of law. The Black Caucus plaintiffs argue that the Acts violate the Equal Protection Clause because they dilute the votes of county voters for members of the local delegations. The Supreme Court has explained as follows that local government officials are subject to the requirement of one person, one vote under the Fourteenth Amendment only when the officials are selected by popular election to perform governmental functions:

> [W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable,

> that equal numbers of voters can vote for proportionally equal numbers of officials.

Hadley v. Junior Coll. Dist., 397 U.S. 50, 56, 90 S. Ct. 791, 795 (1970). The Eleventh Circuit held in *DeJulio* that local delegations in Georgia are not subject to the requirement of one person, one vote because the legislature, not the local delegations, is engaged in the governmental function of lawmaking. 290 F.3d at 1296. Because the parties agree that the local delegation system is virtually the same in Alabama as it is in Georgia, we must conclude that the local delegations in Alabama are not subject to the requirement of one person, one vote and the equal protection claim in count three fails as a matter of law.

DeJulio involved a challenge to the local delegation system in Georgia as violative of the requirement of one person, one vote. Each county, municipality, or other jurisdiction in Georgia has a local delegation that consists of "any legislator whose district encompasses territory within a specific city or county." 290 F.3d at 1293. "Local bills" that apply only to a particular county, municipality, or other jurisdiction are sent to the delegation, which then makes recommendations to standing committees in the House and Senate. *Id.* To receive a "do pass" recommendation from the standing committee in the House, the local delegation must be unanimously in favor of the legislation. *Id.* To receive a "do pass" recommendation from the standing committee in the Senate, Senate Rule 187(u) requires the approval of a majority of the local delegation. *Id.* Because members of the Georgia

Legislature "become delegation members by virtue of their popular election, not through appointment," the Eleventh Circuit concluded that the delegations are "popularly elected." *Id.* at 1295. But the Eleventh Circuit also concluded that the delegations do not "engage in governmental functions" because all legislation has to be passed by the legislature and signed by the Governor. *Id.* (internal quotation marks omitted).

In *DeJulio,* the Eleventh Circuit considered and rejected the argument that local delegations carry out the general governmental function of lawmaking. The court explained that a local bill had to receive at least a majority vote from a delegation to be reported with a "do pass" recommendation to the Georgia House and Senate, and when local legislation received the requisite level of support from the local delegation, ordinarily the Georgia Legislature enacted the legislation "on an uncontested basis as a matter of local courtesy." *Id.* at 1296. But nothing in Georgia law required the legislature to defer to local courtesy. *Id.* Members of the House or Senate could contest local bills, and the court held that the lack of such contests did not "render plenary authority to the local delegations with respect to the enactment of local legislation." *Id.* The court explained that, although delegations were given substantial deference with respect to local legislation, local legislation was not enacted until it was "voted on by a majority of the full House and Senate and signed by the Governor." *Id.* The court held that the Georgia Legislature, not the delegations, engaged in lawmaking. *Id.*

The local delegations in the Alabama Legislature perform materially the same role as the local delegations in the Georgia Legislature. A local delegation for a particular county in the Senate consists of all senators whose districts include any portion of that county. And the members of a local delegation must approve any local legislation that would affect the county before that legislation may be considered by one of the four Local Legislation Committees in the Senate. Depending upon the internal protocols of each local delegation, local legislation can move forward after either a majority vote in favor of the legislation or a unanimous vote in favor of the legislation. Although local legislation is often uncontested on the Senate floor as a matter of local courtesy, there is no Senate rule that requires deference to delegations. Local legislative delegations in the House also consist of all representatives whose districts include a portion of the particular county, and these local delegations must approve local legislation before it is sent to the House floor. House members are free to oppose local legislation on the floor, but local legislation is often uncontested as a matter of courtesy. Nevertheless, local legislation, like all other legislation, is not officially enacted until it is approved by majorities of both houses and signed by the Governor or approved by majorities of both houses over the veto of the Governor. As the Black Caucus plaintiffs have conceded in both filings to this Court and at the hearing on the pending motions, the local legislative system in Georgia is "virtually the same [as] Alabama's."

The record contains several news articles, submitted by the State defendants without objection, about Alabama legislators who disregarded local courtesy to prevent the enactment of certain pieces of local legislation. According to one article, Representative Johnny Mack Morrow stated his intention to "file a written notice [to] contest all local legislation in the Alabama House of Representatives" because the Alabama Legislature did not override a gubernatorial veto of legislation he sponsored. That article also reported that Representative Craig Ford filed a notice to contest all local legislation as part of a strategy to slow the business of the Alabama Legislature. And another news article reported that Representative Joseph Mitchell contested at least two pieces of local legislation that affected his county, even though a majority of his local delegation had approved the legislation. These examples, all occurring in 2013, establish that local courtesy, although prevalent, can be thwarted by the objection of a single legislator. And the Black Caucus plaintiffs conceded at the hearing that these articles were accurate and that legislators can and have disregarded local courtesy.

The Black Caucus plaintiffs attempt to distinguish their facial challenge from the one in *DeJulio* on the ground that *DeJulio* involved a direct challenge to the local legislative system and count three challenges "the statutory boundaries that define who the member of each local delegation will be," but this argument fails. The argument advanced by the Black Caucus plaintiffs cannot be squared with an issue

actually decided in *DeJulio*: that elected members of local delegations, like those in Georgia, do not perform governmental functions of the kind that would subject them to the requirement of one person, one vote under the Fourteenth Amendment. *See* 290 F.3d at 1296. We have no basis on which to conclude that the Acts violate the requirement of one person, one vote because of the effect they have on the local delegations when that requirement does not apply to the local delegations at all. *See Hadley,* 397 U.S. at 56, 90 S. Ct. at 795.

In the end, this facial claim would make more sense if it had been brought as a direct challenge to the local delegation system instead of the redistricting Acts. The Acts are not responsible for the local delegation system in Alabama. The rules for local delegations are created by the action of newly elected legislators at the organizational session held each quadrennium. Even if we were to enjoin the use of the Acts for elections, a new legislature, elected in accordance with new district maps, could still adopt the same system of local delegation. To the extent that the Black Caucus plaintiffs challenge the district lines instead of the local legislative system to avoid the adverse circuit precedent in *DeJulio,* we reject that strategy.

In a final attempt to escape the conclusion that their claim fails as a matter of law under *DeJulio,* the Black Caucus plaintiffs challenge that decision as wrong, but we cannot accept that argument. The Black Caucus plaintiffs contend, "*DeJulio*'s conclusion

that local delegations are not exercising general governmental functions, notwithstanding the gatekeeping and local courtesy customs that empower local delegations in Georgia, just as they do in Alabama, was erroneous." Even if we agreed with that dubious proposition, we would lack the power to deviate from the controlling precedent of the Eleventh Circuit. *See Wallace,* 269 F. Supp. at 350 ("It is the clear duty of this [three-judge] district court to follow the decision of our Court of Appeals. All of the cases which have spoken on the subject so hold."). The State defendants have established that they are entitled to judgment as a matter of law on the equal protection claim in count three under *DeJulio* and that no genuine dispute of a material fact would prevent the entry of a partial summary judgment in their favor. *See* Fed. R. Civ. P. 56(a).

3. Even If We Were Not Bound by *DeJulio,* We Would Conclude that the Alabama Local Delegations Do Not Exercise Governmental Functions.

Even if we were not bound by the decision of the Eleventh Circuit in *DeJulio,* we would conclude that local delegations in Alabama are not subject to the requirement of one person, one vote. Supreme Court precedent makes clear that the requirement of one person, one vote applies only when "a state or local government decides to select persons by popular election to perform governmental functions." *Hadley,* 397 U.S. at 56, 90 S. Ct. at 795. And local delegations

do not perform the kind of governmental functions identified by the Supreme Court as necessary to subject a local governmental official to the requirement of one person, one vote.

The exercise of governmental functions was a key factor in the decision of the Supreme Court to apply the requirement of one person, one vote to the board of trustees of a consolidated junior college district at issue in Hadley. The Court explained that, in *Avery v. Midland County,* 390 U.S. 474, 88 S. Ct. 1114 (1968), it had applied the one person, one vote principle to a local election "where the elected officials exercised 'general governmental powers over the entire geographic area served by the body.'" *Hadley,* 397 U.S. at 53, 90 S. Ct. at 793 (quoting *Avery,* 390 U.S. at 485, 88 S. Ct. at 1120). And the Court applied that principle in *Hadley,* where the trustees "perform[ed] important governmental functions within the districts" and exercised powers "general enough" and with "sufficient impact throughout the district." *Id.* at 53-54, 90 S. Ct. at 794. As examples of these governmental functions, the Court noted that the trustees "can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college." *Id.* at 53, 90 S. Ct. at 794. Officials selected by popular election who do not perform important governmental functions would not fall within the *Hadley* rule. *See id.* at 53-54, 90 S. Ct.

at 794. But the Court further explained that, even when the officials do perform important governmental functions that would otherwise fall within the scope of the rule it announced, "there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups" that the election of those functionaries need not comply with the requirement of one person, one vote. *Id.* at 56, 90 S. Ct. at 795.

Since *Hadley,* the Supreme Court has considered, on three occasions, the scope of the rule it established in *Hadley. See Ball v. James,* 451 U.S. 355, 371, 101 S. Ct. 1811, 1821 (1981); *Associated Enters., Inc. v. Toltec Watershed Improvement Dist.,* 410 U.S. 743, 93 S. Ct. 1237 (1973); *Salyer Land Co. v. Tulane Lake Basin Water Storage Dist.,* 410 U.S. 719, 730, 93 S. Ct. 1224, 1231 (1973). In *Salyer* and *Associated Enterprises,* the Supreme Court concluded that two water districts fell within the exception identified in *Hadley* for special-purpose functionaries. *See Associated Enters.,* 410 U.S. at 745, 93 S. Ct. at 1238; *Salyer,* 410 U.S. at 728, 93 S. Ct. at 1229. The Court explained that the water storage district in *Salyer* was "vested with some typical governmental powers," including the power to take private property for the construction of district projects, the power to contract for the construction of those projects, and the power to employ and discharge its staff, but it had "relatively limited authority" and its actions "disproportionately affect[ed] landowners." *Id.* at 728-29, 93 S. Ct. at 1230. And in *Associated Enterprises,* the Court

reasoned that the water district fell within the special purpose exception to the rule in *Hadley*. *See* 410 U.S. at 744, 93 S. Ct. at 1237. The Court also explained that the "statute authorizing the establishment of improvement districts was enacted by a legislature in which *all of* the State's electors have the unquestioned right to be fairly represented." *Id.*, 93 S. Ct. at 1237-38. But in *Ball*, the Court said more than in either *Salyer* or *Associated Enterprises*. The Court explained that the water district in *Ball* "d[id] not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*." 451 U.S. at 366, 101 S. Ct. at 1818. And the Court reasoned, in the alternative, that, even if one were to accept the governmental functions as described by the Court of Appeals, "[a]s in *Salyer*, the nominal public character of [the] entity c[ould not] transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election." *Id.* at 368, 101 S. Ct. at 1819.

The decisions of the Supreme Court in *Hadley*, *Salyer*, and *Ball* guide our understanding of the kinds of governmental functions or powers that officials must exercise for their popular election to be subject to the requirement of one person, one vote. The body that administers a school system, for example, performs a "vital governmental function" that triggers the requirement of one person, one vote for the election of its members. *See Hadley*, 397 U.S. at 56, 90 S. Ct. at 795. And the elected body that provides general public services, including police, fire, "housing, transportation, utilities, roads, or anything else

of the type ordinarily financed by a municipal body" performs the kind of governmental function that triggers the requirement of one person, one vote. *See Salyer,* 410 U.S. at 729, 93 S. Ct. at 1230. And the same can be said for the elected bodies with the power to impose ad valorem property taxes or sales taxes; the power to enact laws to govern the conduct of citizens; and the power to administer sanitation, health, and welfare services are all important and traditional governmental powers. *See Ball,* 451 U.S. at 366, 101 S. Ct. at 1818. By contrast, "the provision of electricity is not a traditional element of governmental sovereignty and so is not in itself the sort of general or important governmental function that would make [a] government provider subject to the doctrine of the *Reynolds* case." *Id.* at 368, 101 S. Ct. at 1819-20 (internal citation omitted).

The local delegations in Alabama do not exercise general governmental powers or functions of the kind that the Supreme Court has identified as necessary to trigger the requirement of one person, one vote. As a matter of courtesy, local delegations review and recommend local legislation to the Alabama Legislature as a whole. Local delegations exercise no general regulatory powers over counties; that is, local delegations cannot impose taxes; administer schools; or provide emergency services, housing, transportation, utilities, roads, sanitation services, health services, or welfare. *See Ball,* 451 U.S. at 366, 101 S. Ct. at 1818. And local delegations cannot enact laws for the counties. *See id.* Local legislation must be passed by a majority of the legislature and signed by the governor,

or passed by a majority of the legislature over a governor's veto. Although the practice of local courtesy makes it likely that local legislation recommended by the local delegations will be passed by the Alabama Legislature, that likelihood depends entirely on the will of the whole body, which need not continue or honor the practice of local courtesy. Because local delegations do not exercise any general regulatory powers and the power of lawmaking is reserved to the legislature as a whole, we cannot conclude that local delegations "perform important governmental functions" that are "general enough" and with "sufficient impact" to justify the extension of *Reynolds* to the election of local delegations. *See Hadley,* 397 U.S. at 53-54, 90 S. Ct. at 794.

Our dissenting colleague would apply the requirement of one person, one vote to all governmental bodies unless they fall within the special purpose exception described in *Hadley,* Dissenting Op. at 74, but the Supreme Court made clear in *Hadley* that the requirement of one person, one vote applies only when "a state or local government decides to select persons by popular election to perform governmental functions." 397 U.S. at 56, 90 S. Ct. at 795. That statement necessarily implies that the requirement of one person, one vote does not apply when the officials either are not popularly elected or do not perform governmental functions. And the Court reiterated in *Salyer* that it had extended the requirement of one person, one vote to school districts exercising powers that "show[ed] that the trustees perform[ed]

important governmental functions within the districts, and [that were] general enough and ha[d] sufficient impact throughout the district to justify the" application of the requirement. *Salyer,* 410 U.S. at 727, 93 S. Ct. at 1229 (quoting *Hadley,* 397 U.S. at 53-54, 90 S. Ct. at 794).

Several courts have concluded that state and local government officials do not exercise governmental functions of the sort that trigger the requirement of one person, one vote for their elections when the officials only recommend action to voters or to another governmental body that is apportioned in compliance with the requirement of one person, one vote. *See Educ./Instruccion, Inc. v. Moore,* 503 F.2d 1187, 1189 (2d Cir. 1974) (concluding that a regional council did not have to comply with the requirement of one person, one vote because the "powers and functions of the council[ ] are essentially to acquire information, to advise, to comment and to propose," none of which constituted governmental functions within the meaning of *Hadley)*; *Driskell v. Edwards,* 413 F. Supp. 974, 977-78 (W.D. La. 1976) (three-judge court) (concluding that "the principles of one-man, one vote had no application to the selection of delegates to the Louisiana Constitutional Convention of 1973" at least in part because "[n]o act of the Convention takes on the force of law unless and until ratified by the people in a referendum election"); *McMillan v. Love,* 842 A.2d 790, 799-801 (Md. 2004) (reasoning that the Anne Arundel County delegation operates in a factually analogous manner as the local delegations in Georgia

and concluding that the delegation is not subject to the requirement of one person, one vote because the delegation only refers and recommends legislation to the Maryland General Assembly); *Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n,* 522 N.W.2d 783, 788-90 (Iowa 1994) (concluding that the Mayors' Commission, which studies and formulates resolutions that are proposed to the Commonwealth Council to be approved, rejected or amended by that body, is not subject to the requirement of one person, one vote because it cannot meet the "threshold determination [that] the body performs governmental functions"); *see also Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.,* 158 F.3d 92, 95-96, 107 (2d Cir. 1998) (concluding that the Grand Central Management Association, which employed security guards and sanitation workers, assisted retailers in improving the attractiveness of the district, contributed to the funding and operation of an outreach facility for homeless persons, and operated tourist information booths, fell within the special purpose exception under *Salyer* because its functions were overseen by the City, served a narrow purpose, and were secondary to the services provided by the City). These courts argue that the Supreme Court has made clear that a state or local official must perform governmental functions to be subject to the requirement of one person, one vote. Because local delegations in Alabama do not perform those functions, we would conclude, even absent the binding precedent of *DeJulio,* that the equal protection claim in count three fails as a matter of law.

Our dissenting colleague argues that the decision in *Polk* was based on the flawed reasoning of the Missouri Supreme Court overturned by the Supreme Court in *Quinn v. Millsap,* 491 U.S. 95, 109 S. Ct. 2324 (1989), Dissenting Op. at 95, but we disagree. In *Quinn,* the Supreme Court of the United States reversed a decision of the Supreme Court of Missouri that "the Equal Protection Clause ha[d] no relevancy" to a membership requirement for a board of freeholders that did not exercise general governmental powers. *Id.* at 104-05, 109 S. Ct. at 2330. The Supreme Court of the United States explained that the Supreme Court of Missouri had conflated the one person, one vote requirement with the Equal Protection Clause. *See id.* But a state or local body must respect the general demands of the Equal Protection Clause even when the election of its members is not governed by the requirement of one person, one vote. *See id.* at 104-05, 109 S. Ct. at 2330-31. The Supreme Court of Iowa made no such error in *Polk*; the court held only that "the Mayors' Commission does not exercise general governmental powers" and, therefore, "the one person, one vote constitutional principle is not violated by the structure of the proposed commonwealth charter." *Polk*, 522 N.W.2d at 790.

Our dissenting colleague also suggests that, after its decision in *Educ./Instruccion,* the Second Circuit rejected our reasoning in *Baker v. Regional High School District Number 5,* 520 F.2d 799 (2d Cir. 1975), Dissenting Op. at 94 n.12, but that decision is distinguishable. *Baker* involved a one person, one vote

challenge to a school board that had the power to initiate and propose budgets to the voters for ratification, to propose bond ordinances to the voters, to hire and fire teachers, to supervise and discipline students, and to manage all of the schools in the district. *Id.* at 801-02. The Second Circuit explained that, in the light of these powers, "there can be no question but that the board members perform important governmental functions within the districts and . . . these powers are general enough and have sufficient impact throughout the district to justify the conclusion that [one person-one vote] should be applied here." *Id.* at 802 (quoting *Hadley,* 397 U.S. at 53-54, 90 S. Ct. at 794). Although the Second Circuit suggested that the gatekeeping role of the school board was an important governmental function, *id.,* that gatekeeping role differed significantly from the role of the local delegations. The school boards exercised actual regulatory authority over the schools, and the voters could consider only proposals recommended to them by the school boards, *id.* at 801-02. By contrast, the local delegations have no regulatory authority and operate solely by virtue of informal courtesy. The Alabama Legislature could deviate from the recommendations of local delegations at any time.

Our dissenting colleague also argues that our reasoning that the governmental function of lawmaking is carried out by the Legislature, not the local delegations, is flawed because neither house of the legislature by itself can make laws, Dissenting Op. at 83, but that argument fails too. The passage of legislation by each house of the legislature is a

traditional government function and quintessential aspect of governmental sovereignty. *See Ball,* 451 U.S. at 368, 101 S. Ct. at 1819. And the Supreme Court has explicitly held that "seats in both houses of a bicameral state legislature must be apportioned on a population basis," so we need not engage in the analysis under *Hadley* at all. *See Reynolds,* 377 U.S. at 568, 84 S. Ct. at 1385.

Our dissenting colleague's reading of the relevant precedents would radically expand the scope of the one person, one vote requirement. All legislatures, including the Alabama Legislature, rely on committees to facilitate their work. In Alabama, each house of the legislature has several committees charged with examining bills on a particular subject matter and recommending action on those bills to the House or Senate. *See* Ala. Const. Art. IV, § 62. And the Rules Committee of each house determines the order in which bills that have been reported from the committees may be considered by the House or Senate. If our dissenting colleague were correct that the "gatekeeping function" performed by the legislative delegations triggers the requirement of one person, one vote, then that requirement would, as a matter of logic, apply to other legislative committees as well. We agree with the reasoning of the district court in *DeJulio* that "a mere advisory role in lawmaking as typically exists with legislative committees, subcommittees, and local legislative delegations cannot trigger the 'one person, one vote' requirement." *DeJulio v. Georgia,* 127 F. Supp. 2d 1274, 1298 (N.D. Ga. 2001), *affirmed* by *DeJulio,* 290 F.3d at 1291. "The Equal Protection

Clause of the Fourteenth Amendment and the 'one person, one vote' principle does not limit a legislative body to functioning as a committee of the whole. It does not require a properly apportioned legislative body to distribute power and influence so that every legislator is as powerful and influential as every other member of the body." *Id.*

Our dissenting colleague argues that committee members are appointed and local delegations are elected, but there can be no dispute that both members of committees and local delegations are selected through a process that occurs after the election of the legislators. *See* Dissenting Op. at 62 ("Excluded from the rule would, therefore, be appointed officials, for they are not elected, and legislative, executive, and administrative committees and other intra-structural bodies, for officials are not elected to those bodies (although they may nevertheless be elected to a different body, *i.e.*, the legislature itself, and then 'appointed,' in a sense, to the other, *i.e.*, the legislative committee)."). In Alabama, the legislative committees and local delegations are all appointed in the same organizational session that occurs each quadrennium. Until that meeting, no such internal organization exists. Our dissenting colleague relies on dicta in *DeJulio* in which the Eleventh Circuit stated in passing that local delegations in Georgia were popularly elected under *Hadley* because legislators become members of the local delegation by virtue of their election to the legislative seat, but the Eleventh Circuit did not purport to decide a contested point about the selection of local delegations. *Cf. United*

States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us.") (internal quotation marks omitted). The Eleventh Circuit also did not explore the implications of that point with respect to other subparts of the legislature. The Eleventh Circuit instead rested its decision on the narrow point that local delegations do not perform the kind of governmental functions that trigger the requirement of one person, one vote. We see no logical distinction between the manner in which local delegations are created and the manner in which all legislative committees are created. If our dissenting colleague were correct that local delegations in Alabama are subject to the requirement of one person, one vote, we would also have to conclude that all legislative committees are subject to that requirement.

We decline to interpret the requirement of one person, one vote to prohibit the ordinary manner in which legislatures conduct business. The Equal Protection Clause is satisfied by the apportionment of the legislature in accordance with the requirement of one person, one vote. Intrastructural bodies, whether committees or local delegations, need not satisfy the same requirement. The Legislature is free to assign legislators from rural areas to a committee on agriculture and legislators from coastal areas to a committee on tourism without regard to concerns of apportionment. And the Legislature is free too to assign members with constituents in a certain county to the local delegation for that county without

requiring that every member represent the same number of constituents in that county.

III. CONCLUSION

On consideration of the motions, reply, and response (Docs. # 95, 106, 107, 108, 109) as well as supporting and opposing authority, it is **ORDERED** that the motion by the State defendants for a partial summary judgment as to the claim of partisan gerrymandering in count three of the amended complaint filed by the Black Caucus plaintiffs is **GRANTED**. We **DISMISS** the facial challenge under the Equal Protection Clause in count three of the amended complaint filed by the Black Caucus plaintiffs for lack of subject matter jurisdiction. The motion by the Black Caucus plaintiffs for reconsideration of our order denying their motion for a partial summary judgment as to count three of their amended complaint is **DENIED**. The motion by the Black Caucus plaintiffs for entry of a permanent injunction is **DENIED AS MOOT**.

DONE this 2nd day of August, 2013.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT
JUDGE PRESIDING

/s/ W. Keith Watkins
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CIVIL ACTION NO. 2:12cv691 (Three-Judge Court) (WO)
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CIVIL ACTION NO. 2:12cv1081 (Three-Judge Court) (Filed Aug. 2, 2013)

THOMPSON, District Judge, concurring in part and dissenting in part:

I agree with the majority's disposition of the First Amendment partisan gerrymandering claim and with much of its reasoning in support of that disposition. As for the one-person, one-vote claim, while I agree that the issue of justiciability has been properly raised by the court, I respectfully disagree with the

majority's dismissal of the claim on that ground. And, second, I respectfully disagree with the majority's reasoning on the merits.

I. BACKGROUND

In Alabama, during each election for members of the State Legislature (the House of Representatives and Senate), when Alabamians cast a vote for a single legislative representative, they are actually electing one official who will serve in two capacities tied to the geographic locations from which they are elected. For one, the legislator will represent a particular district in the State Legislature as a whole. Second, the legislator, depending on the location of the district, will become a member of one or more "Local Delegations" (or, as they are sometimes called, "Legislative Delegations"), which are formally subdivisions of the Legislature charged with the origination of "local" laws generally affecting a single county alone. *See* Ala. Const. art. IV, § 110 (defining "general" and "local" laws). Although Alabama has created certain local bodies of county governance, such as county commissions, *see* 1975 Ala. Code. § 11-3-1, state law generally vests those bodies with very limited authority, if any at all, to legislate for the county. *Compare, e.g.*, Ala. Const. amend. 783 (affording the Baldwin County Commission comparatively broad, albeit still limited, legislative authority), *with, e.g.*, amend. 482 ("The Limestone county commission is hereby authorized . . . to provide for the disposal of dead farm animals, and the excavating of human graves.").

Rather, state law generally requires that local laws, no matter how purely local their character may be, must be enacted by the Legislature as a whole (and, for reasons unnecessary to discuss here, often as amendments to the State Constitution rather than as mere statutes). The Alabama Constitution has been amended hundreds of times with such laws addressing an enormous range of wholly local concerns, from the mundane to the very important. *Compare, e.g.*, Ala. Const. amend. 497 (authorizing prohibition of "the overgrowth of weeds and the storage and accumulation of junk, inoperable motor vehicles and other litter" in Jefferson County), *with, e.g.*, amend. 429 (authorizing governing authorities in Jefferson County to conduct a range of activities related to economic and industrial development).

Because the Alabama Legislature as a whole must address the varying interests across all of Alabama's 67 counties, it has created a system of Local Delegations to carry out the task efficiently. Each Alabama county has a corresponding Local Delegation in both houses of the State Legislature. Every legislator elected to the Senate or House, upon his election, automatically becomes a member of the Local Delegation for every county that lies within his district, no matter how large or small is the part of the county falling within the district boundaries. If a legislator's district lies almost entirely in one county and only slightly in another, that legislator nevertheless joins the respective Local Delegations for both counties. Within any given delegation, all members

cast equal votes regardless of the comparative sizes of their constituencies in the county at issue.

In order to be enacted eventually, all proposed local laws must be first proposed by the Local Delegation for the county affected. Some Local Delegations require majority approval in the delegation and others require unanimous approval. Without the approval of the delegation for the county at issue, the bill proceeds no further. In that sense, the delegations are the "gatekeepers" of local legislation.

Once the delegation approves a local law, the bill is sent to a legislative committee.[1] After committee approval, the bill is sent to the Legislature as a whole. There, after approval by the requisite number of legislators in both chambers, the bill is sent to the governor for signature, after which it becomes binding law. When a proposed local law is being considered by the Legislature as a whole, the Legislature generally applies an unwritten rule of so-called "local courtesy" holding that the delegations deserve significant deference and their proposed laws should be

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[1] Both the Alabama House and Senate have a handful of legislative committees dedicated to local legislation, and those committees divide up the State's counties among them. A few committees take up local legislation from a single large county alone. In those cases, the membership of the delegation and the committee is identical and the delegation and the committee are, for all intents and purposes, one and the same. Most Local Delegations send their bills to committees that are responsible for reviewing the proposed laws from a large number of smaller counties.

enacted as a matter of course. While the rule of courtesy is sometimes violated, such violations are more the exception than the rule. In any event, regardless of what happens in the Legislature as a whole, the gatekeeping requirement that the bill be first approved by the applicable Local Delegation is steadfastly applied. There is no indication in the record that the gatekeeping requirement has ever been violated. In short, the Local Delegations, although subdivisions of the Legislature for the State as a whole, are geographically based on the State's individual counties and are the single most important legislating bodies for those counties.

The State Legislature is established by formal state law. Ala. Const. art. III, § 42 & art. IV, § 44. The Local Delegations, by contrast, are generally creatures of custom. The delegations' core local-law-gatekeeping function is not an enumerated power in any particular part of Alabama's Constitution or statutory law, and likewise, no written law provides for the whole of the delegations' operations. However, provisions scattered throughout the State Constitution and Code appear to recognize the existence of the delegations and control a number of aspects of their existence. *See, e.g.*, 1975 Ala. Code §§ 36-6-12 (relating to Local Delegation employee salaries), 36-27-5.1 (pensions), 45-22-130.02 (providing for Local Delegation involvement in certain intra-governmental disputes), 45-24-210 (providing for certain Local Delegation funding), and 45-27A-60 (relating to town trust account). In particular, a number of Constitution

and Code provisions appear to afford various Local Delegations the power to appoint officers of various other governmental agencies. *See, e.g.,* 1975 Ala. Code §§ 9-14C-3 (park commission), 45-2-243.22 (tourism board), 45-5-90 (economic development authority), 45-6-231 (prison work-release program regulatory board), 45-8-90 (economic development authority), 45-8-150.02 (bingo regulatory agency), 45-8A-24 (water and sewage board), 45-8A-130.04 (civil service board), 45-25-92.30 (economic development authority), 45-28-91.01 (tourism board), 45-28-244.01(d) (taxing agency), 45-28-244.01(e) (library committee), and 45-30-101.01 (board of education); Ala. Const. amend. 677 (water and sewage board), amend. 741 (judicial commission), and 780 (judicial commission).

While the Local Delegations are formally part of the Legislature as a whole and are generally maintained through unwritten custom, one would be mistaken to assume that they are nothing more than amorphous practices that can be found in the halls of Montgomery's legislative buildings. While the delegations differ, at least some appear to maintain local office space and regular paid staff, like any typical governmental agency that serves the public in a defined geographic region. *See, e.g.,* 1975 Ala. Code §§ 45-2-190 ("There is hereby established the Baldwin County Legislative Office. The County Commission of Baldwin County shall provide office space, office furniture, office equipment, telephone service, and accommodation for the members of the legislative delegation from the county. The personnel for the

legislative delegation office shall be selected by the members of the legislative delegation. . . ."), 45-6-190 (similar, for Macon and Bullock counties), 45-24-190 (similar, for Dallas County), 45-27-190 (similar, for Escambia County), and 45-29-190 (similar, for Fayette and Lamar counties).

This Local Delegations system has existed in some form for decades at least, if not since the enactment of the 1901 State Constitution. It is, in short, the mostly unwritten law of county governance in Alabama.

II. JUSTICIABILITY

The plaintiffs' one-person, one-vote claim contends, essentially, that Alabama's Local Delegations system causes unconstitutional discrimination as to voters' representation in government because all Local Delegation members have equal powers in the delegation while representing disproportionate numbers of voters in the county at issue, and members often representing constituencies outside the county as well. They base their claim not on the legislative districts currently in place, which are set to expire soon, but rather on the redistricting plans that have already been enacted and will be in effect for the next election, and under which, the plaintiffs allege, the State divides an excessive and unprecedented number of counties among multiple legislative districts. The county splitting is relevant, the plaintiffs explain, because now, more than ever before, more Local

Delegation members will represent larger out-of-county interests over and to the detriment of smaller in-county interests, thus diluting the ability of a county's residents to affect their county's affairs. In essence, the plaintiffs seek to have greater local control over local affairs than the State's redistricting plans provide. In response, the majority says that Alabama's next Legislature may choose to abandon entirely or alter materially the whole Local Delegations system, and therefore, the voter inequality feared by the plaintiffs would never come to be. That possibility, the majority concludes, means that the claim should be dismissed on grounds of ripeness and standing.

A.

As for ripeness, the majority states correctly the general proposition that, "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Ante*, at 22 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). The majority, however, fails to apply that principle properly. The mere existence of any future contingency is not enough to render a claim unripe. If it were, litigants would never be able to assert claims seeking to enjoin future injurious conduct, as there is always at least a mere theoretical possibility that circumstances between now and then could somehow change so as to stave off the injury. *See Doe v. Bush*, 323 F.3d 133, 138 n.4 (1st Cir. 2003) ("[The defendants' argument] would seem

to say that a case cannot be ripe on the basis of reasonably predictable future injury. This is not the law. The doctrine of ripeness asks whether an injury that has not yet happened is sufficiently likely to happen to warrant judicial review.") (punctuation and citation omitted).

Rather, when the plaintiffs' feared injury is contingent on future events, to determine whether the claim creates ripeness concerns, "a court must assess the *likelihood* that a contingent event will deprive the plaintiff of an injury. In other words, it is not merely the existence, but the '*degree* of contingency that is an important barometer of ripeness.'" *Mulhall v. UNITE HERE Local 355,* 618 F.3d 1279, 1291-92 (11th Cir. 2010) (emphasis in original) (quoting *Riva v. Massachusetts,* 61 F.3d 1003, 1011 (1st Cir. 1995)); *see also Riva,* 61 F.3d at 1011 ("[A] litigant seeking shelter behind a ripeness defense must demonstrate more than a theoretical possibility that harm may be averted."); *Martin Tractor Co. v. Fed. Election Comm'n,* 627 F.2d 375, 379 (D.C. Cir. 1980) ("If the injury be a future one, the occurrence of the injury must be reasonably certain and clearly describable for the action to be deemed 'ripe' for adjudication.").

The majority ignores this degree-of-likelihood inquiry, explaining that the inquiry is relevant only where a future contingency may "*deprive* the plaintiff of an injury" that is already felt; not where an inchoate injury is dependent on a future contingency (and thus, the question is whether the injury "will occur at

all"). *Ante*, at 26. That distinction is not supported by any case law (the majority cites none, nor can it) and is not logically consonant with the central purpose of the ripeness doctrine: to protect courts "from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *E.g., United States v. Rivera,* 613 F.3d 1046, 1050 (11th Cir. 2010).

In cases where the plaintiffs' feared injury is contingent on substantially uncertain future events, courts cannot reliably apply legal principles to the facts at hand, facts which may be hazy, changing, or otherwise amorphous, to determine whether or not there is or will be an actual violation of legal right. *See, e.g., Elend v. Basham,* 471 F.3d 1199, 1211 (11th Cir. 2006) (holding a First Amendment claim involving the right to protest unripe where the "analysis depends so critically on the location and circumstances of the protest zone" and "we don't know when [the plaintiffs] will protest, we don't know where they will protest, and we don't know how they will protest"); *Johnson v. Sikes,* 730 F.2d 644, 649 (11th Cir. 1984) (holding a claim unripe so as to avoid "render[ing] an opinion advising what the law would be on an assumed set of facts"). There, the circumstances are, in short, "not fit for adjudication." *Texas,* 523 U.S. at 300. By contrast, in cases where it is anticipated that the injury will be caused by future events that are sufficiently certain and the relevant contours sufficiently delineated, the facts are concrete enough to be amenable to application of law; and, there, the court

should discharge its duty of declaring legal rights. *See, e.g., Riva,* 61 F.3d at 1011-13 (holding ripe a challenge to a statute anticipated to cause future injury: "The paramount harm to [the plaintiff] – the eventual reduction in his benefits – is distant in time, but its incidence seems highly probable." "There is no basis to suppose that any adjudication will be hampered by factual uncertainty. . . . The retirement scheme must now face judicial scrutiny."). A central goal of the ripeness doctrine is to separate those cases amenable to legal analysis from those that are not, and, thus, when legal claims involve future events, it is critical to assess the likelihood of those events occurring as anticipated. *Cf. Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 297 (1979) ("The difference between an abstract question and a 'case or controversy' is one of degree, of course.").

Properly understood, the ripeness inquiry this court faces is whether it is sufficiently likely that the State will carry out the anticipated conduct that the plaintiffs contend will cause unconstitutional vote dilution: that is, one, conducting an election for members of the Legislature and the Local Delegations in accordance with the already enacted redistricting plans, and, two, continuing the operation of the State's longstanding Local Delegations system. As there is no doubt that the election will occur along the lines drawn by the redistricting plans, the only remaining question is whether it is sufficiently likely that the Local Delegations system will continue to operate in the same manner it has for decades. If the

court agrees that the system will probably continue as the plaintiffs expect (that is, how it has historically operated), then all relevant facts are sufficiently concrete for the application of bedrock one-person, one-vote principles. And here, based on the evidence in the record, it is apparent that the actual likelihood of the State abandoning or materially altering the longstanding system is essentially nonexistent. The record shows as follows:

First, there is the fact that the Local Delegations system at issue in this case is not some hypothetical future legislative innovation, but rather, "the parties appear to agree that the local delegations system has been adopted by every Alabama Legislature for decades." Order (Doc. No. 130) at 4. In addition to the parties agreeing that the system is decades old, the evidence in the record is corroborative. According to the Clerk of the Alabama House, who has worked for the House for over 20 years, the system has been in place the entire time. Likewise, the Secretary of the Alabama Senate, who has worked for or with the Legislature for 40 years, agreed with respect to his tenure. Also corroborative are published judicial decisions discussing or at least mentioning a Local Delegations system of some sort from years past, one from as far back as 1936. *See Hardy v. Wallace,* 603 F. Supp. 174, 176-77 (N.D. Ala. 1985) (three-judge court); *Buskey v. Oliver,* 565 F. Supp. 1473, 1476-77 (M.D. Ala. 1983) (Thompson, J.); *Birmingham-Jefferson Civic Ctr. Auth. v. Hoadley,* 414 So. 2d 895, 906 (Ala. 1982) (Maddox, J., dissenting); *Bolden v.*

City of Mobile, 423 F. Supp. 384, 397 (S.D. Ala. 1976) (Pittman, J.); *Brown v. Moore,* 428 F. Supp. 1123, 1138 (S.D. Ala. 1976) (Pittman, J.); *Ala. State Teachers Ass'n v. Lowndes Cnty. Bd. of Educ.,* 289 F. Supp. 300, 311 (M.D. Ala. 1968) (three-judge court); *Yeilding v. State ex rel. Wilkinson,* 232 Ala. 292, 167 So. 580, 593 (Ala. 1936) (Brown, J., dissenting).

Second, the record also shows that, not only has the system been in place for decades, but also the system's procedural rules have not changed materially throughout that time. According to the House Clerk, the "local legislation rules" have been "fairly consistent" or "a constant" throughout his tenure. Woodard Dep. (Doc. No. 132-1) at 11:13-12:2. Specifically, he stated that the rule that a legislator join the delegations for all counties in his district in any small part, no matter how small (the key issue at the center of this litigation), had not changed "since [he had] been involved" with the House. *Id.* at 15:22-16:6. The Senate Secretary's testimony was similar: for "as long as [he could] remember," the "rules regarding local legislation [had] changed very little." Harris Dep. (Doc. No. 132-2) at 6:10-21. Also in the record is an affidavit of a legislator and Local Delegation member describing the system's rules, and, although he does not explicitly say so, it is apparent from the context that he believes that those same rules will be in effect during the next legislative session. *See* Newton Decl. (Doc. No. 35-9).

Third, because we are dealing with probabilistic predictions, the gaps in the evidence are just as

relevant as the evidence in the record; and here, the evidentiary gaps are telling. For one, there has been no testimony of anyone who remembers any time when either house of the Alabama Legislature actually chose to abolish or materially alter the system, to take any steps in that direction, or to even consider doing so. And, there has been no testimony of anyone in this case, not the House Clerk, Senate Secretary, defendant legislators, plaintiff legislators, or anyone else, that they think it likely, or even reasonably plausible, that the system will be abolished or materially altered at any time in the foreseeable future. And, there is no indication in the record that any legislator, or even any member of the public who intends to seek office as a legislator, has expressed a desire to abolish or materially alter the system. In short, there is no evidence in the record that anyone has ever before attempted to eliminate the Local Delegations, or that anyone intends to do so in the future.

Indeed, even the plaintiffs in this case have represented that they desire for the system to remain in place in some form. To the extent that the majority seems to believe that the plaintiffs seek to eliminate the system, the majority wholly misconceives what this litigation is about. While the system as used with the challenged redistricting plans will allegedly cause unnecessary and unconstitutional vote dilution, the complete elimination of the Local Delegations system, which provides at least some measure of local control, would be worse. "[G]iven the absence of home rule

powers for counties in the Alabama Constitution, eliminating the ability of legislators to control local laws affecting the county they represent would further dilute the ability of county residents to govern themselves and would subject them to tighter control by central state government in Montgomery." Pls.' Br. (Doc. No. 133) at 5. In short, the basic goal of this litigation is to increase local control over local affairs, and the elimination of the Local Delegations system, if not replaced with something else that provides for comparable local control, would have the precise opposite effect. Moreover, it would have a racial dimension that would raise serious concerns under the Voting Rights Act, as it would have the effect of transferring power away from the black legislators who represent the majority-black counties and to the white majority of the State as a whole. "Doing away with the Local Delegations custom . . . would impair 'the way blacks are gaining true political power in Alabama.'" *Id.* at 6. *Compare Hardy v. Wallace,* 603 F. Supp. 174, 175-77 (N.D. Ala. 1985) (three-judge court) (after it became clear that the majority-black Greene County was going to soon elect its first black legislators, the outgoing white Local Delegation amended a statute affording the delegation the power to make certain agency appointments to instead give the appointment power to Governor Wallace); *see also* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act,* 102 Yale L.J. 105, 115 (1992) (discussing *Hardy* and contending that its facts "powerfully demonstrate [that] legislative delegations

have often been the objects of intense racial maneuvering aimed at undercutting their authority").[2]

Fourth, the majority states that the next Legislature may abandon or materially alter the Local Delegations system during the next organizational session required by § 48.01 of the Alabama Constitution, but it is not clear whether doing so would even be lawful, as § 48.01 enumerates the "[only] business [that] can be transacted at such sessions" and it does not specifically mention Local Delegations at all. *See* Ala. Const. art. IV, § 48.01. As such, there seems to be a real question as to whether abolishing or altering the system during an organizational session would in fact violate § 48.01. *See generally Van Hart v.*

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[2] In fact, reported cases suggest that Alabama's preference for centralized, rather than local, control embedded in the State Constitution to some extent is rooted in racist motives at the 1901 convention. It is well known that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (citations omitted). "[Z]eal for white supremacy ran rampant at the convention." *Id.* One district court found that the 1901 Constitution's hostility to county home rule was "motivated at least in part by race. . . [It was] important not to have too much power in the hands of the counties, or to make sure that the power . . that is at the local level [was] in safe, that is, Democratic and white hands." *Knight v. Alabama*, 458 F. Supp. 2d 1273, 184-85 [sic] (N.D. Ala. 2004) (Murphy, J.) (punctuation and citation omitted); *see also Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1357-58 (M.D. Ala. 1986) (Thompson, J.) (discussing efforts to keep political power out of the hands of black voters in the heavily black counties by favoring centralized over local authority).

deGraffenried, 388 So. 2d 1196, 1199 (Ala. 1980) (discussing the actions that may constitutionally be taken in organizational sessions). The question seems to have never been faced because, as mentioned, it appears that the Legislature has never once actually attempted to abolish the Local Delegations system during an organizational session. And, while the majority has concluded that the rules adopted by the Alabama House and Senate at the organizational session control whether and to what extent the delegations will have "gatekeeping" power over local laws, in fact the current rules of the current Legislature do not anywhere mention Local Delegations even though, as all agree, the current Legislature unquestionably uses the Local Delegations system.[3] The fair inference is that the Local Delegations system is separate and apart from the rules drafted in the organizational sessions.[4]

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[3] *See* Rules, Alabama State Senate, *available at* http://www.legislature.state.al.us/senate/senaterules/senaterulesindex.html (last visited July 11, 2013); Rules, Alabama State House of Representatives, *available at* http://www. legislature.state.al.us/house/houserules/houserulesindex.html (last visited July 11, 2013).

[4] Additionally, there may be evidence in the record that the Alabama Legislature may not attach the same importance to remaking itself anew each organizational session that the majority seems to imply it does: the House Clerk wanted to "[m]ake clear" during his deposition that the House is "supposed to" adopt rules during its organizational session, but "[i]t doesn't always happen." Woodard Dep. (Doc. No. 132-1) at 17:9-13.

Fifth, the majority's analysis does not include the fact that aspects of the Local Delegations system are enshrined in written law: as already mentioned, scattered provisions of the Alabama Constitution and Code appears to provide for the Local Delegations to have certain specified powers, office space, employees with salaries and pensions, and more. As the State Constitution recognizes and controls the existence of Local Delegations in certain respects, there is a state-law issue as to whether the next Legislature could constitutionally eliminate the delegations without first repealing these constitutional provisions that presuppose their existence. And the same issue would seem to be present with respect to the Alabama Code, which also appears to presuppose the delegations' existence in numerous places. While it is theoretically possible, of course, that the Legislature could lawfully eliminate the Local Delegations one way or another despite their being recognized and controlled by provisions of the State Constitution and Code, we should be hesitant to find it likely that the next Legislature will do so, especially here, where not one single legislator is on the record as indicating any intent in this regard.

Viewing this evidence in the light most favorable to the plaintiffs, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986), or viewing the evidence without favor to either side, the conclusion is obvious: The evidence overwhelmingly indicates that the Local Delegations system will

almost certainly continue to exist with Alabama's next Legislature and the material aspects of the delegations will be the same as they are today, the same as they were last century, the century before that, and as far back as anybody involved in this litigation knows. This case, in short, bears out the maxim that the past is prologue to the future. The record simply contains no good reason to think that the next Legislature may abandon the delegations, which appears to have never happened before, never been attempted before, and is not something anybody actually wants. "[A] litigant seeking shelter behind a ripeness defense must demonstrate more than a theoretical possibility that harm may be averted," and that, the State has not done. *See Riva,* 61 F.3d at 1011.[5]

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[5] The majority cites evidence of a 1999 episode in which a Democratic-controlled Alabama Senate revised its rules to "dramatically reduce" the Republican Lieutenant Governor's powers and argues that, since the Legislature made such changes then, it may make comparable changes again, say, maybe this time by eliminating the Local Delegations system. *See ante*, at 30-31. I find it quite telling that the example of a past change to legislative procedures is one so dramatic and unique. That this 1999 change is put forward as comparable in likelihood to a change in the Local Delegations system shows just how unlikely a change in the system is for the next session. In any event, the singular, 1999 episode can hardly outweigh the evidence that Local Delegations have been used for decades, nobody has ever attempted to eliminate them, and nobody has indicated a desire to do so in the future.

While the majority states unequivocally that, "The rules for local legislation, including the use of local delegations, are adopted in the organizational session," *ante*, at 5, I do not read the sources on which the majority relies, the Alabama House Clerk's and Senate Secretary's depositions, to say that. Indeed, both persons testified that legislative rules *are* adopted in the organizational session, but as already mentioned, those rules say *nothing* about whether the State will have Local Delegations or what powers those delegations will have. *See supra,* note 3. The majority leaps from "during the organizational session, the Legislature enacts rules" to "during the organizational session, the Legislature enacts the rules that sub silentio determine whether Local Delegations exist," but I do not see how that leap is supported by anything the House Clerk or Senate Secretary actually said. And, more importantly, the leap seems to be in contradiction of all the formal law providing that the Local Delegations "shall" exercise certain powers, *e.g.,* Ala. Const. amend. 677, they "shall" have offices, *e.g.,* 1975 Ala. Code § 45-2-190, their employees "shall" have pensions, *e.g.,* Ala. Code § 36-27-5.1, etc.

As the Local Delegations continue to exist in Alabama in fact and in law, as recognized by a number of statutes, constitutional provisions, and decades of custom, and there is no reason to think that that existence will cease, the alleged harm the delegations' malapportionment will cause in the imminent future is ripe for review. *Cf. Glavin v. Clinton,* 19 F. Supp. 2d

543, 547 (E.D. Va. 1998) (three-judge court) ("Defendants suggest that the case is not ripe because 'Congress has not reached its ultimate legislative conclusion regarding a sampling census.' Although it is certainly possible that Congress may seek to prevent the Department from conducting its plan to utilize sampling, there is no legal significance to this observation. Congress may always moot out a controversy by passing new legislation, but that fact does not shield agency action from judicial review. There is always the possibility that settlement or some external event will render a case moot, but that hardly renders the litigation nonjusticiable before that event occurs."), *aff'd sub nom. Dep't of Commerce v. House of Representatives,* 525 U.S. 316, 329 (1999) ("[T]he District Court below correctly found that the case is ripe for review, and that determination is not challenged here."). Unless and until the State actually elects to eliminate the Local Delegations, they, like all other local bodies of government, are subject to judicial review. *See Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents*, 633 F.3d 1297, 1309-10 (11th Cir. 2011) (once a governmental defendant's challenged conduct voluntarily ceases, the defendant "enjoy[s] a rebuttable presumption that the objectionable behavior will not recur" and, if not rebutted, the case is moot).

B.

As for standing, as an initial matter, it cannot be questioned that the plaintiffs' asserted vote-dilution injury is a judicially cognizable one. *See Fairley v.*

Patterson, 493 F.2d 598, 603 (5th Cir. 1974) ("[T]he Supreme Court has conclusively established . . . that sufficient damage through underrepresentation to obtain standing will be inflicted if population equality among voting units is not present.") (citations omitted). Once again, the only question here is whether that injury will actually come to pass. While the majority states correctly that there is no standing if the injury is merely "conjectural or hypothetical," *ante*, at 27 (quoting *Lujan,* 504 U.S. at 560-61), it is also true that "there is no per se rule denying standing to prevent probabilistic injuries." *Fla. State Conference of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1162 (11th Cir. 2008); *see also id.* ("[W]e have repeatedly upheld plaintiffs' standing when the alleged injury was prospective and probabilistic in nature."). Put another way, "[i]njury sufficient to meet the standing requirement . . . may involve a contingent risk of injury." *Ore. Envtl. Council v. Kunzman,* 817 F.2d 484, 491-492 (9th Cir. 1987). In such cases, whether the contingent risk of injury is sufficient to support standing turns on whether the plaintiffs are "likely" to suffer the injury feared. *City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983); *see also Cone Corp. v. Fla. Dep't of Transp.,* 921 F.2d 1190, 1205 (11th Cir. 1991) (aggregating cases and concluding, "[i]n sum, a plaintiff seeking declaratory and injunctive relief [must] show[ ] that the defendant is likely to injure the plaintiff"); *cf. Va. State Corp. Comm'n v. F.E.R.C.,* 468 F.3d 845, 848 (D.C. Cir. 2006) (requiring a "substantial probability"). The degree of probability required to support standing is "undemanding." *Fla.*

State Conference of N.A.A.C.P., 522 F.3d at 1163; *see also Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 451 (7th Cir. 1990) (although the likelihood of the alleged injury occurring was "thin gruel, it [was] no thinner than" other cases finding standing). Based on the evidence already discussed and viewing that evidence in the light most favorable to the plaintiffs, it is clear that a sufficient likelihood of injury to support standing has been shown here. *See also Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 861-62 (E.D. Wis. 2001) (three-judge court) ("To achieve standing, all one needs to do is allege a 'threat' that one's voting rights may be diluted. . . . [Here,] the plaintiffs have met the 'relatively modest' burden of alleging a realistic threat of imminent injury to their voting rights.").

The next element of standing is causation. The majority concludes that there is none here because it is the Local Delegations system's procedural rules, not the redistricting maps that the plaintiffs seek to enjoin, that causes the vote-dilution injury. That argument misconceives the nature of the injury. In all one-person, one-vote cases, the unconstitutional vote dilution is brought about by two factors acting in conjunction, one, that elected officials represent disproportionate numbers of voters, and two, that those officials exercise equal power despite having unequal constituencies. *Cf. Roxbury Taxpayers Alliance v. Delaware Cnty. Bd. of Supervisors*, 80 F.3d 42, 49 (2d Cir. 1996) (declining to find a one-person, one-vote violation because, even though the districts were

not equipopulous, the legislators were afforded weighted votes in accordance with their respective constituency sizes); *Thigpen v. Meyers,* 231 F. Supp. 938, 941 (W.D. Wash. 1964) (three-judge court) (ordering weighted voting, rather than redistricting, to remedy a one-person, one-vote violation). The injury alleged in this case is caused by the redistricting plans as much as it is by the rules affording all Local Delegation members equal power.

Likewise, the injury is redressable for purposes of standing. It cannot be questioned that a redistricting remedy by itself could remedy the one-person, one-vote violation in at least some Local Delegations. Given the tension between the State's competing one-person, one-vote obligations vis-á-vis the Local Delegations and the Legislature as a whole (since one individual serves in both capacities), redistricting alone could probably not, without some additional other sort of remedy, eliminate the violation in all Local Delegations across the full length of the State. But, that fact does not defeat standing. *See Massachusetts v. E.P.A.,* 549 U.S. 497, 526 (2007) ("[The risk of global warming causing harm] would be reduced to some extent if petitioners received the relief they seek."); *Chiles v. United States,* 69 F.3d 1094, 1096 (11th Cir. 1995) (Florida had standing to pursue claims that the U.S. Attorney General was unlawfully failing to stem the tide of illegal immigration because, even though "illegal immigration is dependent on many other factors outside the control of the Attorney

General," the court "could offer some relief to Florida").[6]

Even if the majority is correct that this court could not order any of the named defendants to remedy the full extent of the one-person, one-vote violation across the entirety of the State, that does not defeat standing; it is enough that, one, the court's decree would alter legal duties such that the injury would be remedied in part (that is, in some Local Delegations), and two, "the practical consequences" of the decree would be "a significant increase in the likelihood that" the injury would be remedied in full (that is, in all Local Delegations across the State). *Utah v. Evans,* 536 U.S. 452, 464 (2002) (finding an injury redressable even though the President, who had ultimate power over whether the injury would continue, was not a named defendant and would not be bound by any decree issued by the court, but would nevertheless likely honor the judiciary's judgment); *see also Duke Power Co. v. Carolina Envtl. Study Grp.,* 438 U.S. 59 (1978) (finding an injury redressable when the injury was caused by a third party,

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[6] The majority's argument that "one person, one vote is not the sort of injury that can be redressed by partial compliance," ante, at 35-36, forgets that the standing doctrine itself often precludes plaintiffs from challenging the full makeup of a governmental body and rather limits the legal challenge to discrete districts. *See, e.g., United States v. Hays,* 515 U.S. 737 (1995). Despite the majority's dicta without citation to authority, there never has been an "all-or-nothing" requirement in redistricting cases.

not the defendants against whom the desired decree would run, because of the possibility of the third party reacting voluntarily to the decree so as to cease injurious conduct). If this court were to declare Alabama's Local Delegations system to violate constitutional requisites, it is substantially likely that State officials, even those not formally bound by this court's decree, would take the message to heart, and it is plainly apparent that the State could, should it desire, eliminate the violation in full through any number of procedural devices, whether having weighted voting in the Local Delegations, having different persons serve in the Local Delegations and the Legislature as a whole, or otherwise.[7]

In sum, the vote-dilution injury alleged by the plaintiffs is both likely and redressable, and the plaintiffs have standing to seek that redress.

C.

While the State may currently feel discontent over the existing degree of federal judicial involvement in its redistricting, I fear that the majority's

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[7] Indeed, the State has repeatedly argued throughout this litigation that the redistricting plans challenged in this case were the result of a good-faith attempt at complying with principles of law explicated by a three-judge district court in Georgia, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court). While Alabama was, of course, not bound by the Georgia court's decree, it nevertheless claims to have put great effort into honoring it.

ripeness and standing analysis may unintentionally sentence the State to a quagmire of perpetual litigation much greater than that occurring now. Suppose the plaintiffs wait until after the election to challenge the State's redistricting plans as they relate to the Local Delegations (as the majority says they must), and the court finds the case to have merit and orders remedial redistricting. Because each member of a Local Delegation is also a member of the Legislature as a whole, the remedial redistricting may then invite a claim that, as a result of the attempt at remedying the Local Delegations violation, the redistricting plans now violate one-person, one-vote in the Legislature as a whole. If that claim has merit and a second round of remedial redistricting is required, the State may, once again, be open to a new round of litigation over the Local Delegation districts. This may proceed ad infinitum until the State succumbs to a drastic remedy, replacing the current system with something entirely different. In short, I think the law not only allows this court to consider at the same time the redistricting plans as they relate to the Local Delegations and the Legislature as a whole, but furthermore, sound public policy prefers that this court do so.

III. MERITS

A.

I now turn to the merits. The "one-person, one-vote" rule under the equal protection clause of the Fourteenth Amendment requires that "the vote of any

citizen [be] approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims,* 377 U.S. 533, 579 (1964) (holding that the Alabama Legislature as a whole must adhere to one-person, one-vote). While that principle was at first applied to state legislatures, it is now "beyond question" that, because "[t]he Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State," the one-person, one-vote rule applies with equal force to the State's subdivisions as well, including city, county, and other bodies of local government. *Avery v. Midland Cnty.,* 390 U.S. 474, 479-80 (1968); *see also Bd. of Estimate v. Morris,* 489 U.S. 688 (1989); *Hadley v. Junior College Dist.,* 397 U.S. 50 (1970).

Where the State has, without rational justification, through its districting plans or other forms of state action, created preferred classes of citizens who cast votes of a greater weight than others, the State has denied the equal protection of the laws. *See Reynolds,* 377 U.S. at 563 (the "right to vote" of "individual voters living in disfavored areas" "is simply not the same right to vote as that of those living in a favored part of the State"). "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Moore v. Ogilvie,* 394 U.S. 814, 819 (1969).

Here, Alabama's Local Delegations system creates clear differences of voting power among the

State's citizens, and the "discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically." *Reynolds,* 377 U.S. at 563. The Local Delegations system results in several forms of discrimination among Alabamians and the legislators elected to serve their interests.

The first distinction is between Alabamians of a particular county. After discounting the out-of-county voters who have no interest in a foreign county's local affairs (but elect members to the county's Local Delegation anyways), there is a difference of voting power among any given county's residents with respect to their ability to select members of their own Local Delegation. For example, in Jefferson County, the most populous county in Alabama, reside approximately 658,000 people. As explained, the Jefferson County Local Delegation's core function, legislating, and its lesser functions, such as agency appointments, relate to a single geographic region's population alone: the 658,000 residents of Jefferson County. However, under the challenged redistricting plans, those county residents will have dramatically different voices in the delegation charged with legislating in their interest. The Jefferson County Local Delegation in the House of Representatives will include the legislators from 18 districts (HD 14-16, 43-48, 51, 52, and 54-60). All of those districts will contain approximately 45,000 people each. Some of the districts, however, will be made up of Jefferson County residents exclusively (that is, about 45,000 Jefferson County residents per district), while others will

include large numbers of people residing in other counties as well. One district in the delegation, HD 43, for example, will include only 200 or so Jefferson County residents and about 44,800 neighboring Shelby County residents who, as residents of an area in which the Jefferson County Local Delegation exercises no powers, lack a legitimate interest in the delegation's affairs. It is apparent that, when selecting members of the Jefferson County Local Delegation, the 200 Jefferson County voters residing in HD 43, after discounting the 44,800 disinterested Shelby County voters, cast votes of far greater strength than do Jefferson County voters residing in any of the delegation's other districts "merely because of where they happen to reside" in the county. *Reynolds,* 377 U.S. at 563. Those 200 voters exercise the same power over county affairs (a single vote on the Local Delegation) as do 45,000 others. In short, the Local Delegation "give[s] the same number of representatives to unequal numbers of constituents" in the county, *id.* at 563, and that discrimination among county residents seeking to influence their county's affairs "is hostile to the one man, one vote basis of our representative government." *Moore,* 394 U.S. at 819.

The second distinction is between legislators. Depending on whether a legislator's district lies entirely within a single county or instead crosses county lines, the legislator exercises differing powers in the Legislature: he has either the ability to serve as the "gatekeeper" of local laws for either a single county (if his district falls within a single county

alone) or multiple counties (if his district touches multiple counties). As for Jefferson County, again, some of the county's Local Delegation districts lie entirely within the county; the representatives of those districts will be able to legislate for Jefferson County and no other. By contrast, the representative of HD 43 will have equal ability to influence the affairs of both Jefferson County and Shelby County, even though only about 200 of the legislator's constituents will live in the former and about 44,800 will live in the latter. It is obvious that, in a political body like the State Legislature, where horse trading is a necessary part of business, affording some members greater powers than others is not without consequence. *Cf. Bannister v. Davis,* 263 F. Supp. 202, 209 (E.D. La. 1966) (three-judge court) ("[A] representative does more than simply vote for legislation. He [also] exerts personal influence on other representatives. . . ."). The HD 43 representative, who will legislate for both Jefferson and Shelby counties, simply does not stand on an equal footing with a representative empowered to legislate for Jefferson County alone; the former is empowered to influence legislation affecting the latter's constituents, but the latter lacks a corresponding power. And, of course, that power differential is not a result of political acumen, but is rather predetermined at the time of every election on the basis of nothing more than whether the legislator's district is in a favored or disfavored part of the State.

The third distinction is between the Alabamians who elect legislators to represent their interests. Because of the fact that some legislators are afforded greater legislative powers than others, it is, correspondingly, also the case that, within a particular area of the State, certain Alabamians may, through their representatives, influence the local legislative affairs of their neighbors in other counties, although those neighbors cannot do the same for them. *Cf. Bd. of Estimate,* 489 U.S. at 698 ("[A] citizen is shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two.").

Consider the following example. Jefferson County has approximately 658,000 residents and neighboring Shelby County has approximately 195,000; together, the combined two-county area contains about 853,000 people. Among those 853,000 people, about 45,000 of them, the residents of HD 43, will be able to, through their representative, exercise legislative power over themselves and all of their neighbors in both counties in the area; they will have a voice in the local affairs of all 853,000 people. Others, those residing slightly further down the road, in a district wholly in Jefferson County, will be able to legislate for about 658,000 people, the residents of Jefferson County alone. And, finally, a third group, those residing in a district wholly in Shelby County, will be able to legislate for about 195,000 people, the residents of Shelby County alone. There is simply no rational justification for the State affording the HD 43 voters such an amplified

voice, giving them dominion over their neighbors who are not similarly empowered. In short, the Local Delegations system divides this community of about 853,000 people into classes, affording the "individual voters living in disfavored areas" a "right to vote [that] is simply not the same right to vote as that of those living in [the] favored [areas]." *Reynolds*, 377 U.S. at 563; *see also id.* at 563-64 ("To say that a vote is worth more in one district than in another would run counter to our fundamental ideas of democratic government.") (punctuation and citation omitted).

Although I have focused on Jefferson County and its neighbors, lest I be misunderstood, I emphasize here that such discrimination will exist across Alabama. In the challenged redistricting plans, 50 of the State's 67 counties are split among multiple legislative districts in the State House of Representatives and 33 are split in the State Senate, and this is far more county splits than had occurred in prior redistrictings. What I have described is found in each of those places.

While the three forms of discrimination already discussed are enough to show the constitutional infirmity in this case, there is a fourth, closely related, reason to think the State's legislative delegations scheme may be unconstitutional. That is, the State has given people (say, the HD 43 voters who reside in Shelby County) the power to influence a governmental body that they have no legitimate interest in (say, the Jefferson County Local Delegation), thereby diluting the votes of the legitimately interested

voters. Although the Supreme Court has never directly addressed the matter, other courts have suggested that such circumstances are unconstitutional. *E.g., Cantwell v. Hudnut,* 566 F.2d 30, 36 (7th Cir. 1977) ("Although there are no decisions on the point, we shall assume the correctness of the District Court's view that a state law allowing strangers to participate in the vote for representatives to a local legislative body having general governmental powers over a particular territory would offend the equal protection rights of the resident voters in that territory.").

Under the law of the Eleventh Circuit Court of Appeals, the State unconstitutionally violates the rights of voters with legitimate interests in a particular governmental body when the State extends the franchise to other persons lacking a "substantial interest." *Sutton v. Escambia Cnty. Bd. of Educ.,* 809 F.2d 770, 772 (11th Cir. 1987) ("The test for whether the statute is irrational as applied to the particular county is whether the city residents have a substantial interest in the operation of the county school system. If the city residents do not have a substantial interest, then the state must exclude the city residents from voting."). Other circuits have come to similar conclusions. *See Creel v. Freeman,* 531 F.2d 286, 288 (5th Cir. 1976) (same); *Duncan v. Coffee Cnty.,* 69 F.3d 88, 94 (6th Cir. 1995) (same); *cf. Locklear v. North Carolina State Bd. of Elections,* 514 F.2d 1152 (4th Cir. 1975) ("compelling state interest").

Here, there has been no legitimate (let alone "substantial") interest proffered for Shelby County

residents voting for the Jefferson County Local Delegation. (In fact, there is reason to think that residents of Shelby County may have adverse interests to those of the neighboring Jefferson County.) A quick look at the State's redistricting plans reveals that, across the State, residents of numerous counties are authorized, through their representatives, to legislate for other, neighboring, and, in many cases, even distant, counties. In the case of HD 16, residents of the rural Lamar County, which is on Alabama's western border with Mississippi, may legislate for the distant, comparatively urban, Jefferson County, the third county to the east, in the middle of the State. In the case of HD 68, Conecuh County residents may legislate for three-county-away Marengo County. There are too many other similar instances to list. (And of course, other voters, by contrast, do not extend such reach; in the case of HD 86, for example, the voters of Houston County may legislate for themselves alone.) It strains credulity to imagine that this hodgepodge of authorizing certain Alabamians to cast votes for "local" (a misleading term here) delegations that do not affect them and only affect faraway others is justified by legitimate state interests.

In fact, defendant State Representative Jim McClendon, who served on the State's legislative reapportionment committee that drew the redistricting plans challenged in this case, raised his own similar concerns in this regard at one of the committee's hearings: "I am now speaking as a representative of St. Clair County and not a member of this

board. . . . I want to get this on the record on behalf of my home county. Right now we have six legislators from St. Clair County. Five of them do not live in St. Clair County. Five of them have a majority of their voters in some other counties. That affects accountability. . . . In St. Clair County, any one of those six legislators, whether they live in the county or not, can veto any local legislation. . . . [T]hat is not right." Legislative Reapportionment Comm. Hr'g Tr. (Doc. No. 30-26) at 7. The irrational scheme for enacting local legislation about which McClendon complains violates the constitutional rule of *Sutton* and related circuit court decisions.

In sum, Alabama has discriminated against certain of its citizens as to their opportunity for democratic participation merely because of where they live in the State and it has done so without any rational justification. That discrimination denies Alabamians the equal protection of the law.

B.

As McClendon acknowledged, Alabama's scheme for enacting local legislation has obvious deleterious effects. The plaintiffs in this case allege that the most drastic instance of a Local Delegation failing to respond to the needs of its citizens can be found in Jefferson County. Based on the present record, it is impossible to determine whether the allegations about Jefferson County have merit, but, in the interest

of illustrating what may be at stake in this case, it is worth noting the contentions.

As the plaintiffs explained it, until recent years, Jefferson County collected an "occupational tax" from persons who resided outside the county and commuted in for business. The Alabama Supreme Court invalidated the tax for reasons unrelated to the issues in this case, thereby causing Jefferson County to lose a significant source of revenue. *See Jefferson Cnty. Comm'n v. Edwards,* 32 So. 3d 572 (Ala. 2009); *Jefferson Cnty. v. Weissman,* 69 So. 3d 827 (Ala. 2011). Although it was clear that new revenue was needed, the county's Local Delegation, which, of course, included legislators whose primary constituencies were outside the county, failed to reenact the occupational tax (in a manner permissible under state law, that is) or to provide for any alternative. That failure was, as the bankruptcy court would describe it, a "major cause" of Jefferson County's subsequent bankruptcy, the largest governmental bankruptcy in American history at the time. *In re Jefferson Cnty.,* 484 B.R. 427, 434 (Bankr. N.D. Ala. 2012) (Bennett, J.); *see also id.* at 436 ("All those who attribute Jefferson County's bankruptcy case . . . only to conduct and actions by the County are ill-informed. The State of Alabama and its legislators are a significant, precipitating cause."). According to a newspaper story in the record, a legislator from Shelby County credited legislators like herself, representing out-of-county interests, with averting reenactment of the occupational tax: "When you add up those people that

represent counties surrounding Jefferson, that's a lot of folks. . . . They don't want their constituents to have to pay an occupational tax for Jefferson County." Barnett Wright, *Jefferson County Lawmakers to Meet, Try Again for Solution* [*to*] *County Financial Crisis*, The Birmingham News, April 22, 2012 (Doc. No. 35-4).

Whether the Jefferson County bankruptcy could have been avoided had the county been governed by a system that respected the rule of one-person, one-vote cannot be known but, as this court adjudges the constitutionality of Alabama's Local Delegations scheme, the possibility should be considered.[8]

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[8] Additionally, given the history of racism to some extent underlying the Local Delegations system's roots, *see supra,* note 2, and issues with racially discriminatory governance in this part of the State in the recent past, *see Shelby Cnty. v. Holder,* ___ S. Ct. ___, ___, 2013 WL 3184629, at *34 (June 25, 2013) (Ginsburg, J., dissenting) (discussing *Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819 (M.D. Ala. 1990) (Thompson, J.)), the appearance of the Local Delegation for Jefferson County, a black population center, being diluted by interests from Shelby County, an overwhelmingly white constituency, is troubling. Another county split may be even more questionable. In the case of HD 61, which is approximately 80% white, that district crosses into Greene County, which is approximately 80% black, to capture a mere 12 people. The effect is, a majority-white constituency can exercise a veto over a majority-black county's residents' wishes, all because a mere 12 people were placed in one district rather than another. Whether these circumstances are evidence of race discrimination, however, is a question for this court for another day.

C.

For the foregoing reasons, I believe that Alabama's Local Delegations scheme, which irrationally empowers certain of the State's citizens to the disadvantage of others, violates the equal protection clause. The majority, however, in its alternative holding on the merits, erroneously decides otherwise because, as the majority explains it, the Local Delegations do not exercise "governmental functions."

1.

Like the majority, I begin my analysis regarding "governmental functions" with *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970). *Hadley* was decided in 1970, six years after *Reynolds,* which, for the first time, applied the one-person, one-vote rule to a state legislature. During the intervening six years between *Hadley* and *Reynolds,* there was uncertainty in the lower courts regarding the sorts of state governmental bodies besides legislatures, if any, to which the one-person, one-vote rule applied. For example, some courts distinguished between "legislative" and "administrative" bodies, assuming that the rule applied to the former but not the latter. *See, e.g., Hyden v. Baker,* 286 F. Supp. 475, 483 n.13 (M.D. Tenn. 1968) (three-judge court) (collecting cases).

In *Hadley,* the Court, addressing this confusion, repudiated distinctions based on the nature of a governmental body's functions, repeatedly eschewing the distinctions that were proposed to limit application

of the one-person, one-vote rule: "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. . . . While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process." 397 U.S. at 54-55. The Court declined to recognize a distinction based on the "importance" of the governmental body. *Id.* at 55. It also declined to recognize a distinction based on whether governmental bodies exercised "legislative" or "administrative" functions. *Id.* at 55-56.

Immediately after having rejected these possible narrowing principles on the application of the one-person, one-vote rule, the Court announced its holding in the very next sentence:

> "We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of

> voters can vote for proportionally equal numbers of officials."

Id. at 56.

This holding contains two essential teachings. The equal protection clause reaches "an elected body," first, whose "members . . . are chosen from separate districts" and, second, which performs a "government function." If these two factors are present, the "district[s] must be established on the basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials," or to put it more succinctly, the one-person, one-vote rule applies.

As to the first teaching, the Court is essentially saying that the clause reaches multi-member bodies whose members are elected from separate districts. This, to me, is the quintessential entity to which the one-person, one-vote rule should apply. It should be emphasized that, *Hadley*'s language is quite narrowly confined to those circumstances where "a state or local government decides to select persons by popular election" to serve in the governmental body at issue (and, within that category, "when members of [a governmental] body are [elected] from separate districts"). *Id.* at 56. Excluded from the rule would, therefore, be appointed officials, for they are not elected, and legislative, executive, and administrative committees and other intra-structural bodies, for officials are not elected to those bodies (although they may nevertheless be elected to a different body, *i.e.*,

the legislature itself, and then "appointed," in a sense, to the other, *i.e.*, the legislative committee).[9] *See Sailors v. Bd. of Educ.*, 387 U.S. 105 (1967) (one-person, one-vote rule does not apply to appointed officials).

As to the second teaching, that the Court used the word "governmental," a word that literally reaches all aspects of what the government does, to modify the word "functions" reflects that the court was emphasizing that the former word should be broadening rather than narrowing. This makes sense since, as the Court indicates, the nature of the bodies' functions is not the decisive factor, but rather, it is the structure of the means of selecting the body (that is, that members are selected by voters) that determines whether the requirements of one-person, one-vote are triggered. If the entity is a multi-member

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[9] The majority says that it "see[s] no logical distinction between the manner in which local delegations are created and the manner in which all legislative committees are created" because the members of both "are all appointed in the same organizational session that occurs each quadrennium." *Ante*, at 61. The difference is obvious: even assuming that committee and Local Delegation "appointments" happen at the same time, the Local Delegations system assigns legislators to delegations "automatically" on the basis of geography, versus the committee system, in which legislators are appointed to committees based on political acumen. As for committees, even though not every legislator will ultimately serve on, say, the agriculture committee, all legislators have the opportunity to seek to do so. In turn, all voters have the equal opportunity to influence the business of the agriculture committee.

body whose members are elected from separate districts, it makes no difference whether its functions are administrative, executive, legislative or whatever, as long as they are governmental. The Court could have used a more limiting modifier, such as by requiring "important," "plenary," or "final" functions, but it did not. *See Hadley,* 397 U.S. at 60 (Harlan, J., dissenting) ("[This] case forebodes, if indeed it does not decide, that the [one-person, one-vote] rule is to be applied to every elective public body, no matter what its nature."); *Twp. of Marlboro v. Bd. of Educ.,* 992 F. Supp. 756 (D.N.J. 1998) (Wolin, J.) ("In essence, the Supreme Court held [in *Hadley*] that all elections must comply with the 'one person, one vote' principle.").[10] The Court imposed no such limiting modifier, instead concluding simply that, "[w]hile there are differences in the powers of different officials," "there is no discernible, valid reason why constitutional distinctions should be drawn on [that] basis." *Hadley,* 397 U.S. at 55-56.

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[10] In Chief Justice Burger's dissenting opinion criticizing the majority's holding, the Chief Justice restated the holding with a notable omission as follows: "'[A] general rule, (that) whenever a state or local government decides to select persons by popular election * * * ,' the Constitution commands that each qualified voter must be given a vote which is equally weighted with the votes cast by all other electors." *Hadley,* 397 U.S. at 70 (Burger, C.J., dissenting). Apparently, the Chief Justice thought the "governmental functions" language was not important enough to warrant repeating.

If *Hadley* itself is not enough to show that the one-person, one-vote rule is broadly applicable to multimember bodies whose members are elected from separate districts, additional Supreme Court decisions should bolster that conclusion. The first case is *Board of Estimate v. Morris,* 489 U.S. 688 (1989), where the Court held that the New York City "Board of Estimate" was subject to one-person, one-vote. There, the Court discussed a broad array of the board's functions, but it did so only insofar as those functions were relevant in determining that the board did, in fact, have some sort of "sufficient impact throughout the district" to invoke the requirements of one-person, one-vote. *Id.* at 696 (quoting *Hadley,* 397 U.S. at 54).

Importantly, in a footnote in the Court's opinion, the Court, quoting from a party submission, listed the board's functions, dividing them between plenary functions that the board handled "exclusively" and non-plenary functions that the board handled "in conjunction with the New York City Council." *Id.* at 694 n.4. In the opinion's body text to which that footnote was appended, the Court, referring to these functions, stated simply that, "New York law assigns to the board a significant range of functions common to municipal governments." *Id.* at 694. Again, the Court here had the opportunity to draw a distinction of constitutional significance based on the nature of those functions, but the Court did not do so. Moreover, in deciding that the board's functions were "governmental" ones invoking the one-person, one-vote

rule, the Court did attach "major significance" to one of the board's non-plenary powers in particular: that is, that "the board shares legislative functions with the city council with respect to modifying and approving the city's capital and expense budgets." *Id.* at 696. The board "recommend[ed]" a budget, but did not have plenary authority to enact its recommendation; rather, "[a]pproval or modification of the proposed budget require[d] agreement between the board and the city council." *Id.* at 694 n.4, 696.

In short, *Board of Estimate* reflects that, as for the nature of a governmental body's functions, the relevant inquiry for determining whether those functions invoke the one-person, one-vote rule is whether those functions cause the body to have some sort of impact in the geographic area it serves, whatever that impact may be, and, furthermore, even non-plenary legislative functions may be highly significant in causing such an impact. So long as the threshold "impact" requirement is met, courts should not second guess whether, given the nature of the body's functions, the effect of the impact is felt strongly enough to warrant equal voting requirements. *See also Hadley,* 397 U.S. at 55 ("If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. . . . If there is any way of determining the importance of choosing a particular

governmental official, we think the decision of a State to select that official by popular vote is a strong enough indication that the choice is an important one.").

In all its years of adjudicating one-person, one-vote cases since these decisions, the Supreme Court has recognized a single limitation on the one-person, one-vote rule's application to multi-member bodies whose members are elected from separate districts, the so-called "special-purpose" exception. The special-purpose exception was first invoked as a possibility in *Avery,* the first Court decision to apply the one-person, one-vote rule to a local governance body: "Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions." 390 U.S. at 483-84. Next, in *Hadley,* after announcing the general rule that the one-person, one-vote rule applies to all elected officials that "perform governmental functions" in defined geographic areas, the Court revisited the possibility although, again, did not apply it: "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in

compliance with *Reynolds* [ ] might not be required." 397 U.S. at 56.

The exception, as described in those cases, is common sense. Although place of residence within a State is an irrational basis for discriminating as to voting power when electing members of the statewide legislature, a body charged with duties impacting all of the State's citizens, *Reynolds,* 377 U.S. at 563, the special-purpose exception simply recognizes that, in other cases, where a governmental body's more narrow functions (that is, not "typical" governmental functions) disproportionately affect some citizens to a greater extent than others, it is entirely rational, perhaps even sensible, that those citizens disproportionately impacted exercise correspondingly disproportionate voting power in electing the members of that body.

The first of three Supreme Court cases to actually apply the exception was *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.,* 410 U.S. 719 (1973). There, the Court concluded that, because the operations of a California "water storage district," distributing water and charging for it according to land ownership, affected citizens to varying degrees according to the amount of land they owned, the State may constitutionally weigh its citizens' votes accordingly to allow those most affected to have the loudest voice when electing members of the body. *Id.* at 729-30; *see also Ball v. James,* 451 U.S. 355, 362 (1981) ("[T]he question in this case [is] whether the purpose of the [governmental body at issue] is sufficiently

specialized and narrow and whether its activities bear on landowners so disproportionately as to distinguish the [body] from those public entities whose more general governmental functions demand application of the *Reynolds* principle."); *Associated Enters., Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744 (1973) (similar).

Years later, in *Quinn v. Millsap*, 491 U.S. 95 (1989), *rev'g* 757 S.W.2d 591 (Mo. 1988), the Court revisited these special-purpose cases (albeit not in the context of one-person, one-vote). There, the Court reversed a Missouri state-court decision holding that the Missouri "Board of Freeholders" may constitutionally limit its membership to landowners. The state court, relying on the three special-purpose cases, read those decisions to stand for the principle that the equal protection clause applied to the board only if it had "general governmental powers." 757 S.W.2d at 594-95 (citing *Salyer, Associated Enters., Inc.*, and *Ball*). The board did not have such "general governmental powers," the state court held, because "[t]he Board of Freeholders serves only to recommend a plan of reorganization to the voters of St. Louis City and St. Louis County." *Id.* at 595. It could not, by itself, implement such a plan; therefore, the state court concluded, "the Equal Protection Clause [had] no relevancy." *Id.*

The Supreme Court reversed because the state court's "ruling reflect[ed] a significant misreading of our precedents." *Quinn*, 491 U.S. at 96. The Court explained, "In holding the board of freeholders

exempt from the constraints of the Equal Protection Clause, the Missouri Supreme Court [] relied [in part] on the fact that the Board of Freeholders serves only to recommend a plan of reorganization to the voters of St. Louis City and St. Louis County and does not enact any laws of its own. But this fact cannot immunize the board of freeholders from equal protection scrutiny"; the special-purpose cases "do not support that conclusion." *Id.* at 104-05 (punctuation omitted). Rather, in each of those special-purpose cases, "the Court expressly applied equal protection analysis and concluded that the voting qualifications at issue passed constitutional scrutiny." *Id.* at 105. In short, regardless of whether a governmental body "enact[s] laws directly" or merely "recommends a proposal," that distinction does not allow the body to escape the ordinary equal-protection scrutiny, and the Court's special-purpose exception jurisprudence does not provide otherwise.

In sum, these decisions, read together, create the following framework. As an initial matter, the Fourteenth Amendment's equal protection clause reaches all governmental bodies regardless of what functions those bodies exercise or what purposes they serve (*Quinn*). Because all governmental bodies (state or local) are subject to equal-protection requirements, those bodies consisting of multiple members each elected from a discrete geographical district are subject to the one-person, one-vote rule (*e.g., Reynolds, Hadley*), unless there is a rational basis warranting otherwise (*Salyer, Associated Enterprises,* and

Ball). If the body has a meaningful impact throughout the geographic region it serves, affording unequal votes on the basis of where within the region the voters happen to reside is irrational (*e.g., Reynolds, Hadley*). That is true regardless of whether the body is important, whether its functions are best characterized as administrative, legislative, or otherwise (*Hadley*), or whether its powers are plenary or are instead limited by some manner of checks and balances (*Board of Estimate*). Simply stated, so long as a governmental body is popularly elected in a defined geographic region and has some sort of meaningful presence across that region, it is subject to one-person, one-vote. In general, almost all governmental multimember bodies whose members are elected from separate districts will meet that description because, in a democratic system like ours, where government is expected to respond to the people, it is a rare occasion when politicians are elected to do nothing. *Cf. Hadley,* 397 U.S. at 55 ("[I]n our country popular election has traditionally been the method followed when government by the people is most desired.").

The Supreme Court has recognized only these circumstances when it is rational, and thus constitutional, to give voters unequal votes: they are when the governmental body at issue does not sufficiently impact all persons in its defined geographic region, but, on the contrary, serves a narrow purpose that, one, affects only some and not others, or two, affects all, albeit disproportionately, and persons have recognizably different stakes in the governmental body

than others. *See Salyer,* 410 U.S. at 736-37 (only landowners, not non-landowners, had stake in water district because there was "no way that the economic burden of district operations [could] fall on residents qua residents, and the operations of the district primarily affect[ed] the land within [the district] boundaries"); *Associated Enters., Inc.,* 410 U.S. at 745 ("landowners [were] primarily burdened and benefitted by the establishment and operation of watershed district" and thus, the "State could rationally" "condition the vote accordingly"); *Ball,* 451 U.S. at 370 (while water district had some impact on non-landowners denied the franchise, the voting scheme was nevertheless constitutional because landowners, who had the franchise, had disproportionately high stakes in the body as they "[were] the only [persons] whose lands [were] subject to liens to secure [] bonds," were the only residents "subject to the . . . taxing power of the [body]," and "[were] the only residents who ha[d] ever committed capital to the [body] through stock assessments"). In those cases, it is rational to preclude from the franchise those not affected by the body or to otherwise tie the franchise to the degree to which persons are affected. There, the persons not affected cannot contend that they are being refused representation that should be fairly expected under principles of democratic governance. Whenever a governmental body that is popularly elected in a defined geographic area seeks to avoid the mandate of one-person, one-vote, the sole inquiry before the court is whether the body has such a narrow purpose and disproportionate effect and, if so,

whether the voting scheme is rationally related to those circumstances. All other inquiries are without matter. *See Ball,* 451 U.S. at 377 (White, J., dissenting) ("[N]othing in *Salyer* changed the relevant constitutional inquiry. Rather, the Court held the *Reynolds-Avery*[ ] line of cases inapplicable to the water district because of its 'special limited purpose' *and* the disproportionate effect of its activities on landowners as a group.") (emphasis in original).

Therefore, the initial critical question here is whether Alabama's Local Delegations are multi-member bodies whose members are elected from separate districts. That the answer to this question is yes is dictated not only by the facts in this case but also by Eleventh Circuit precedent. As stated, when Alabamians cast a vote for a single legislative representative, they are actually electing one official who will serve in two capacities tied to the geographic locations from which they are elected: for one, the legislator will represent a particular district in the State Legislature as a whole, and, second, the legislator, depending on the location of the district, will become a member of one or more Local Delegations. That one legislator is elected to two offices is of no consequence. *See Morris v. Bd. of Estimate,* 707 F.2d 686, 689 (2d Cir. 1983) ("We are impelled to the realistic recognition that a citizen entering the voting booth chooses at one and the same time a member of the Board of Supervisors and his town supervisor." "The mere fact that board members may be characterized as 'delegates' and perform functions in addition to

their duties on the board, does not provide a meaningful distinction.") (punctuation and citation omitted), *aff'd,* 489 U.S. 688, 694 (1989) ("All eight officials become members as a matter of law upon their various elections."). Likewise, that the Local Delegations are mostly not maintained through written law is also without consequence. *See Nashville, C. & St. L. Ry. v. Browning,* 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The equal protection clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text."); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 168 (1970) (similar).

Moreover, Eleventh Circuit precedent addressing a Local Delegations scheme virtually identical to Alabama's likewise concluded that the delegations were multi-member bodies elected from separate districts. *See DeJulio v. Georgia,* 290 F.3d 1291, 1295 (11th Cir.) (holding that, with respect to Georgia's Local Delegations, *Hadley*'s requirement that officials be "elected" is "clearly satisfied" because, "[w]hen public officials become members of [the delegations] simply by virtue of their popular election to the legislature, they are deemed popularly elected [to the delegations] for the purposes of the one person, one

vote requirement") (punctuation and citation omitted), *cert. denied,* 537 U.S. 948 (2002).

Thus, Alabama's Local Delegations are on a par with all other Alabama elected multi-member bodies, such as city governments, county commissions, school boards, regulatory boards, etc. whose members are elected from separate districts. And, it is quite clear that the delegations' powers that they have a meaningful and significant impact throughout the counties they serve. The second question is whether to treat the Local Delegations, multi-member bodies whose members are elected from separate districts, differently from other similar bodies. Absent some special circumstances justifying the refusal to afford equal voting power, Supreme Court precedent says no, and there are no such special circumstances with regard to Local Delegations – or, at least, Alabama has not articulated any.

In stark contrast to that legal framework, the majority today decides that Alabama's Local Delegations are not subject to the one-person, one-vote rule because they do not perform "the kind of governmental functions" that invoke the rule. *Ante,* at 49. Several paragraphs, in particular, in the majority's opinion demonstrate best the flaw in its reasoning. The first paragraph reads in part:

> "The local delegations in Alabama do not exercise general governmental powers or functions of the kind that the Supreme Court has identified as necessary to invoke the requirement of one person, one vote. . . . [L]ocal

> delegations cannot enact laws for the counties. Local legislation must be passed by a majority of the legislature and signed by the governor, or passed by a majority of the legislature over a governor's veto."

Ante, at 53-54 (citations omitted). However, neither of the houses of the Alabama Legislature, acting alone, has these powers either. Each house alone, without approval from the other house, "cannot enact laws"; rather, laws "must be passed by a majority of the legislature [of both houses] and signed by the governor, or passed by a majority of the legislature [of both houses] over a governor's veto." In short, the State House of Representatives, the State Senate, and the Governor each play a role in the legislating process and none, acting alone, can "enact laws." And yet, elections for each of these are subject to the requirements of voter equality.

The majority goes on the say that:

> "[L]ocal delegations cannot enact laws for the counties. . . . Although the practice of local courtesy makes it likely that local legislation recommended by the local delegations will be passed by the Alabama Legislature, that likelihood depends entirely on the will of the whole body, which need not continue or honor the practice of local courtesy. Because . . . the power of lawmaking is reserved to the legislature as a whole, we cannot conclude that local delegations perform important governmental functions that are general enough and with sufficient impact to justify

> the extension of *Reynolds* to the election of local delegations."

Ante, at 53-54 (punctuation and citation). However, this language misses the point for two reasons. First, when the plaintiffs talk about a practice that is never breached, it is not the local courtesy rule (which comes into play after proposed legislation makes it out of the Local Delegation) that is at issue but rather the gatekeeper function (which allows or prohibits local legislation from emerging from the Local Delegations to be considered by the Legislature). But, second, and most importantly, it is not the nature of the governmental function alone that triggers the application of the one-person, one-vote rule, but rather it is, as discussed, the electoral structure.

The majority seems to suggest that, given that passage of local legislation requires at least two steps, initial approval by the delegation and then subsequent approval by the full legislature, so long as the second step satisfies the mandate of voter equality, then there is no harm caused by any inequality at the first step. *See ante,* at 62 ("The Equal Protection Clause is satisfied by the apportionment of the legislature in accordance with the requirement of one person, one vote. Instrastructural bodies, [including] local delegations, need not satisfy the same requirement."). Put another way, even if there is inequality in the delegations, whatever harm that inequality causes is remedied at the second step, in the properly apportioned Legislature as a whole. That argument is without merit. As I have described, the Local

Delegations are the sole bodies charged with beginning the local legislating process. If the delegations do not send a bill proposing a local law to the Legislature as a whole, the desired law will never be enacted.[11] As such, the harm caused by the inequality in the delegations has an obvious continuing effect that is not remedied in the legislature as a whole. *See Baker v. Reg'l High Sch. Dist. No. 5,* 520 F.2d 799, 802 (2d Cir. 1975) ("While [the board's decision to borrow money] must be [subsequently] approved by the voters of the regional district in a referendum, it is or should be clear that this does not substantially undercut the significance of the boards' function. . . . While the voters have the final word, what they ratify or disapprove can be only what the board decides to present to them."); *cf. Avery,* 390 U.S. at 481 ("That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment.").

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[11] The majority repeatedly uses the word "recommend" to describe the legislative function of the delegations. *See, e.g., ante,* at 53 ("As a matter of courtesy, local delegations review and recommend local legislation to the Alabama Legislature as a whole."). It should be emphasized here that use of the word "recommend" can be misleading insofar as it may imply that the Legislature itself is in the business of independently drafting local laws and the delegations merely suggest proposals for the legislature to consider. But that is not the case. The Local Delegations are the sole bodies charged with beginning the local legislating process. If a delegation does not propose a desired local law, the Legislature will never enact it.

The next paragraph of the majority's opinion with which I find fault is as follows:

> "[I]n *Ball,* the Court said more than in either *Salyer* or *Associated Enterprises.* The Court explained that the water district in *Ball* 'did not exercise the sort of governmental powers that invoke the strict demands of *Reynolds.*' And the Court reasoned, in the alternative, that, . . . 'as in *Salyer,* the nominal public character of the entity could not transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election.'"

Ante, at 52 (punctuation and citations omitted). In *Ball,* like the earlier special-purpose cases, while the Supreme Court *did* address the governmental body's functions, it did so for the purpose of explaining why it was reasonable and thus constitutional for the weight of voters' votes to differ. As I described earlier in my discussion of *Ball* and the other special-purpose cases, the central issue is still voters and whether their votes are equal, and, if not, whether that inequality is rationally justified. The critical determination in *Ball* was not just that the body exercised functions that were, in certain respects, more limited than other bodies, but rather that, those narrow functions had a disproportionate effect. *See Ball,* 451 U.S. at 362 ("[T]he question in this case [is] whether the purpose of the [body] is sufficiently specialized and narrow *and* whether its activities bear on landowners so disproportionately as to distinguish [it] from those public entities whose more general

governmental functions demand application of the *Reynolds* principle.") (emphasis added); *see also id.* at 377 (White, J., dissenting) ("[T]he relevant constitutional inquiry [is whether the body has a] 'special limited purpose *and* [] disproportionate effect.") (emphasis in original). *Ball* did not create some sort of freestanding and freewheeling "governmental functions" limitation divorced from the reason for which those functions are relevant. Such a restricted view of the reach of the one-person, one-vote rule is, as I have already explained, wholly inconsistent with the Supreme Court's jurisprudence.

Indeed, the Local Delegations scheme before this court does the precise opposite of that which the special-purpose cases like *Ball* allow: In special-purpose cases, the State affords unequal voting power because doing so allows people uniquely affected by government operations to have greater influence over those operations; but, here, Alabama has taken a class of citizens uniquely affected by a governmental body's operations (the residents of a particular county with respect to their county's Local Delegation) and has, through extending the franchise to entirely disinterested citizens (those in other, sometimes far away, counties), diluted their influence such that it is lesser than it otherwise would be. In other words, the majority's reasoning imposes an exception to the one-person, one-vote rule's application to geographically elected bodies that is precisely the opposite of the single exception the Supreme Court has recognized.

While purporting to rely on *Ball* and other cases, the majority states conclusorily that the limited legislative functions of Alabama's Local Delegations are not "the kind of governmental functions" that invoke the one-person, one-vote rule, ante, at 49, but the majority offers entirely no principled basis for determining what "kind" of functions are the right kind. Instead of offering a principle of some sort that can be applied in later cases, the majority rattles off a series of good and bad functions with no apparent unifying principles at play: for unexplained reasons, "administer[ing] a school system," "provid[ing][ ] police, fire, [and other services]," and "impos[ing] ad valorem property taxes or sales taxes," are all the right kind, but "provi[ding] [ ] electricity" is the wrong kind. *Ante*, at 52-53. For reasons I am at a loss at understanding, the majority seems to think that Alabama's Local Delegations' county-law-gatekeeping function is more akin to that wrong kind of function than it is to the right kinds of functions. The majority's inability to articulate any sort of principled basis for its reasoning is unsurprising since, as the Supreme Court has said, "judicially manageable standards" for "distinguishing between [the purposes of] various elections" are not "readily perceiv[able]." *Hadley*, 397 U.S. at 55; *see also id.* (refusing to distinguish between "legislative" and "administrative" functions because requiring lower courts to do so "would leave courts with an equally unmanageable principle since governmental activities cannot easily be classified in the neat categories favored by civics texts") (punctuation and citation omitted). To the

extent that the majority seems to think that it has found such a judicially manageable standard in this regard, it should say what it is.

And furthermore, the majority's reasoning that Local Delegations "exercise no general regulatory powers over counties," *ante,* at 53, overlooks the numerous statutes allowing Local Delegations to appoint the officials who do. If "administer[ing] a school system" is the right kind of function, as the majority says it is, *ante,* at 52, it is relevant that the Franklin County Local Delegation appoints an official to the board of education which does just that. *See* 1975 Ala. Code. § 45-30-101.01. If "impos[ing] ad valorem property taxes or sales taxes" is the right kind of function, *ante*, at 53, it is relevant that the Etowah County Local Delegation appoints the members of an agency that "receive[s] and administer[s] [certain] tax proceeds" and "issue[s] bonds, secure[s] financing, and retire[s] debt." *See* 1975 Ala. Code. § 45-28-244.01(d). If "the power to administer sanitation [and] health [] services" is the right kind of function, *ante*, at 53, it is relevant that the Calhoun County Local Delegation appoints members of the water and sewer board. *See* 1975 Ala. Code. § 45-8A-24; Ala. Const. amend. 677. The list goes on.

Next, the majority turns to a series of state court and lower federal court opinions that it contends "have concluded that state and local government officials do not exercise government functions of the sort that trigger the requirement of one person, one vote for their elections when the officials only

recommend action to voters or to another governmental body that is apportioned in compliance with the requirement of one person, one vote." *Ante,* at 55. But those decisions do not lend the majority the support it believes.

For one, the majority cites a Second Circuit Court of Appeals decision, *Kessler v. Grand Cent. Dist. Mgmt. Ass'n,* 158 F.3d 92 (2d Cir. 1998). This case, however, applies the special-purpose exception. Thus, for the same reasons already explained, *Kessler,* like *Ball* and the other special-purpose cases, does not support the majority's reasoning; it highlights its wrongfulness. Moreover, the *Kessler* court even cited approvingly the Second Circuit's earlier *Baker* decision, a case rejecting expressly the reasoning the majority adopts today. *See Kessler,* 158 F.3d at 103 (citing *Baker,* 520 F.2d at 802, and stating that, there, the circuit court "concluded that [the one-person, one-vote] rule applied to elections for a regional school board that had 'the exclusive power to initiate and propose' expenditures and borrowing"). Much like the governmental body the *Baker* court decided was subject to one-person, one-vote, Alabama's Local Delegations have the "exclusive power to initiate and propose" certain governmental action (in *Baker,* borrowing money, here, enacting local laws). In sum, *Kessler* in no way supports the majority.[12]

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[12] As for the second opinion from the Second Circuit the majority cites, *Educ./Instruccion, Inc. v. Moore,* 503 F.2d 1187

(Continued on following page)

Next, the majority points to *Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783 (Iowa 1994). What the majority does not say, however, is that that case, in adopting reasoning like the majority's, relied on the overturned Missouri state-court decision in *Quinn v. Millsap*: "Like the Board of Freeholders in [*Quinn v. Millsap*], the Mayors' Commission does not exercise general governmental powers" because "its purpose is to collate information [and] mak[e] a recommendation to [another body]." *Polk Cnty. Bd. of Sup'rs*, 522 N.W.2d at 790. That case, in short, did nothing but perpetuate bad law that the majority seeks to revive, closing its eyes to the fact that the Supreme Court has already spoken.

Lastly, it must be conceded that the majority has indeed found two cases with reasoning similar to its own. In *Driskell v. Edwards*, 413 F. Supp. 974 (W.D. La.) (three-judge court), *aff'd mem.*, 425 U.S. 956 (1976), the district court concluded that the makeup of Louisiana's state constitutional convention was not subject to one-person, one-vote, reasoning that, since

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(2d Cir. 1974), there, the circuit's opinion is so terse, it is difficult to discern what were the functions of the governmental body at issue. But if I read the case properly, it seems that the body's sole duties were to propose non-binding recommendations wholly without legal effect, which is obviously distinguishable from Alabama's Local Delegations. *See supra*, note 11. In any event, both *Baker* and *Kessler* were decided after that case, so surely those decisions are better indicators of the circuit's current thinking.

the convention's proposed revised constitution would not be enacted until ratified by the voters, the rule did not apply. *See id.* at 977-78. For the reasons I have explained at length, I think that the district court's reasoning there, like the majority's today, is inconsistent with the present body of Supreme Court jurisprudence. Moreover, "summary affirmances have considerably less precedential value than an opinion on the merits. . . . [U]pon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979) (punctuation and citations omitted). And finally, the majority cites *McMillan v. Love,* 842 A.2d 790 (Md. 2004), which, in reasoning similarly to the majority, relied on the Eleventh Circuit Court of Appeals decision in *DeJulio v. Georgia,* 290 F.3d 1291 (11th Cir. 2002), the same decision from which this court draws its analysis and which I contend below is, like the majority's reasoning today, erroneous.

2.

The majority also faults the plaintiffs for "fail[ing] to identify the constitutional standard that we should employ to adjudicate [the] claim under the Equal Protection Clause." *Ante,* at 38. The standard for adjudicating the one-person, one-vote rule is far from unresolved: "[E]very district must be established on a basis that will insure, as far as is practicable,

that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley,* 397 U.S. at 56.

Admittedly, Alabama may not be able to achieve one-person, one-vote equally for all Local Delegations while doing the same for both houses of the Legislature. (But then again it may. *See, e.g., Thigpen v. Meyers,* 231 F. Supp. 938, 941 (W.D. Wash. 1964) (three-judge court) ("The weighting of a legislator's vote is but a form of reapportionment, and hence is within the equitable powers of this court, and such weighting gives constitutional validity to the statutes creating legislative districts which we have heretofore declared unconstitutional.") (citation omitted)). And I fully agree with the majority's criticism of the plaintiffs' suggestion that, "when a state enacts voting districts that elect members 'for both the state legislature and for local legislative delegations, . . . the state can deviate from the principle of one-person, one-vote for the local delegations only to the extent that such deviations are necessary to comply with one-person, one-vote . . . for the legislature as a whole.'" *Ante,* at 38 (quoting Pls.' Br. (Doc. No. 106) at 1). Not only do I agree that the plaintiffs fail to define "necessary," I also cannot find anything in the law, constitutional or statutory, that says that achieving one-person, one-vote for Local Delegations should be subordinated to achieving one-person, one-vote for both houses of the Legislature or vice versa.

Instead, that the State is confronted with conflicting legal demands is not new. *Compare, e.g.,*

Thornburg v. Gingles, 478 U.S. 30 (1986) (the Voting Rights Act requires the State to, when redistricting, consider race and ensure minority voting strength to a certain extent), *with Miller v. Johnson,* 515 U.S. 900 (1995) (the State violates the equal protection clause where race is the "overriding and predominant force" in redistricting). What the State must do is resolve that conflict "as far as is practicable." *Hadley,* 397 U.S. at 56; *cf. id.* at 58 ("We have said before that mathematical exactitude is not required, but a plan that does not automatically discriminate in favor of certain districts is."). To the extent that the State falls short in one regard or in another regard or both, that failure, as long as rationally justified, does not violate the one-person, one-vote rule. What the State cannot do is to fail to recognize at all its one-person, one-vote obligations to the voters residing in the Local Delegations across the State.

3.

The majority's reasoning regarding "governmental functions" was drawn from an Eleventh Circuit Court of Appeals decision, *DeJulio v. Georgia,* 290 F.3d 1291 (11th Cir.), *cert. denied,* 537 U.S. 948 (2002). As explained by the majority, that case decided that Georgia's Local Delegations system, which, all parties in this case agree, functioned identically to Alabama's system in all material respects, was not subject to one-person, one-vote. Although the plaintiffs attempt to distinguish *DeJulio* on the basis of the remedy requested in that case, I agree with the

majority that the distinction is without merit because both cases involved identical claims: one-person, one-vote challenges. Thus, although I think *DeJulio*'s reasoning, which the majority now adopts as its own, contravenes the law as explained by the Supreme Court, I nevertheless recognize that that decision is on point here.[13]

* * *

Accordingly, I believe that this court should have reached the merits of the one-person, one-vote claim, and not merely as an alternative holding, and, based on my understanding of Supreme Court jurisprudence, the claim has merit. I respectfully dissent.

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[13] There is a separate question as to whether this three-judge district court convened under 28 U.S.C. § 2284, for which appellate jurisdiction bypasses the Eleventh Circuit and proceeds directly to the Supreme Court, must apply the case law of the Eleventh Circuit. *See Parker v. Ohio,* 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (three-judge court) (Gwin, J., concurring); *Poe v. Werner,* 386 F. Supp. 1014, 1016-17 (M.D. Pa. 1974) (three-judge court). Under the circumstances of this case, where no party has argued or briefed (or, as they conceded at oral argument, even researched) what I consider to be a very complicated issue; where the majority has decided that it will apply *DeJulio*'s reasoning regardless of whether it must; where a three-judge court from our own circuit has already stated that this circuit's law was binding on it, *Ala. NAACP State Conf. of Branches v. Wallace,* 269 F. Supp. 346, 350 (M.D. Ala. 1967) (three-judge court); and where whether *DeJulio* is binding would not, as a practical matter, be determinative in the resolution of any appeal, I think it unnecessary for me to take issue with the majority's statement that *DeJulio* is binding precedent.

Now, only the Supreme Court can correct this injustice to thousands and thousands of citizens across all of Alabama whose votes are being inequitably and greatly discounted.

DONE, this the 2nd day of August, 2013.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-691 (Three-Judge Court)
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-1081 (Three-Judge Court)

MEMORANDUM OPINION AND ORDER

(Filed Apr. 5, 2013)

On March 27, 2013, we entered an order that denied the second motion for partial summary judgment filed by the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner Jr., and Jiles Williams Jr. Later that day, the Black Caucus filed a motion for this three-judge court to alter or amend the order "so

as to comply with Rules 52(a)(2) and 56(a), Fed. R. Civ. P."

For the reasons explained in this memorandum, our initial order denying the second motion for partial summary judgment complied with Rules 52(a)(2) and 56(a). We thus **DENY** the motion, but we sua sponte **VACATE** our previous order, **DENY** the second motion of the Black Caucus for a partial summary judgment, and **SUBSTITUTE** this memorandum opinion and order to explain why the Black Caucus has demonstrated neither that it is "entitled to judgment as a matter of law" nor that "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

I. BACKGROUND

This matter arises from the decennial redistricting of the Alabama Legislature. A special session of the Alabama Legislature convened to establish new districts for the House of Representatives and the Senate. The Joint Legislative Reapportionment Committee established guidelines that restricted population deviations in the new districts to two percent. On May 31, 2012, Governor Robert Bentley signed into law Acts 2012-602 and 2012-603, which established the new districts.

After Governor Bentley signed the Acts, the Black Caucus filed a complaint against the State of Alabama and Beth Chapman, in her official capacity as the Secretary of State of Alabama. That complaint asserted three counts: violation of the guarantee of

one person, one vote under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 2; dilution and isolation of the strength of black votes in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Fourteenth Amendment, U.S. Const. Amend. XIV, and the Fifteenth Amendment, U.S. Const. Amend. XV; and partisan gerrymandering in violation of the First Amendment, U.S. Const. Amend. I. The Black Caucus moved for partial summary judgment and preliminary and permanent injunctive relief on count one of its complaint.

The State defendants moved to dismiss or, in the alternative, to stay the action until Attorney General Luther Strange obtained either administrative or judicial preclearance of the new districts under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We granted the motion of the State defendants to stay the matter until either the Attorney General of the United States, Eric Holder, or the United States District Court for the District of Columbia decided whether to preclear the districts. After Attorney General Holder precleared the new districts, we lifted the stay of the action and denied the motion to dismiss filed by the State defendants. The State defendants then filed an answer to the complaint and a motion for judgment on the pleadings with respect to all three counts. After the hearing on the latter motions, another complaint was filed about the new districts. Demetrius Newton, the Alabama Democratic Conference, Stacey Stallworth, Framon Weaver Sr., Rosa

Toussaint, and Lynn Pettway filed a complaint against the State of Alabama; Robert Bentley, in his official capacity as the Governor of Alabama; and Beth Chapman, in her official capacity as the Secretary of State of Alabama. The Newton plaintiffs asserted three counts in their complaint: violation of section 2 of the Voting Rights Act; racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments; and violations of constitutional and statutory rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After the Newton action was assigned to this three-judge court, we determined that the Black Caucus action and the Newton action involve common questions of law and fact and consolidated them to avoid unnecessary repetition and confusion. *See* Fed R. Civ. P. 42(a)(2).

On December 26, 2012, we denied the first motion for partial summary judgment filed by the Black Caucus with respect to count one, granted the motion of the State defendants for judgment on the pleadings as to count one, denied the motion by the State defendants for judgment on the pleadings as to count two, and dismissed without prejudice count three of the complaint filed by the Black Caucus. We granted the Black Caucus leave to amend its complaint within 21 days from the date of the order "to allege more facts and constitutional grounds to support its claim of political gerrymandering and to identify a judicial standard by which we can adjudicate the claim."

The Black Caucus timely filed an amended complaint with a new count three entitled "Partisan

Gerrymandering." In count three of the amended complaint, the Black Caucus identifies as its standard of adjudication "that traditional or neutral districting principles may not be subordinated in a dominant fashion by either racial or partisan interests absent a compelling state interest for doing so, particularly where the traditional districting principle is embedded in the state constitution." The complaint alleges that the Acts were "designed to promote the agenda of the partisan majority to maximize the number of seats statewide that Republicans will hold in the Legislature" and that the Acts "dilut[e] the voting strength of county residents in electing the members of their local legislative delegations by unnecessarily splitting county boundaries and including in local legislative delegations legislators who are elected in part by voters residing in other counties." The complaint alleges that a "county's local legislative delegation effectively controls most important local government policies." Specifically, the complaint alleges that this control is exercised "through written and informal rules of the Legislature, the rule of 'local courtesy' in particular, by which local laws affecting only one county are routinely uncontested on the floor of the House and Senate when they are approved by that county's local legislative delegation."

The Black Caucus then filed a second motion for partial summary judgment with respect to count three. The Black Caucus contends that the parties do not dispute that "[t]he Reapportionment Committee Guidelines arbitrarily and impracticably required

that 'in every redisricting plan submitted to the Reapportionment Committee, individual district populations should not exceed a 2% overall range of population deviation'"; that the House plan "splits 44 counties more than are necessary to satisfy the one-person, one-vote requirement"; that the Senate plan "splits 31 counties more than are necessary to satisfy the one-person, one-vote requirement"; and that "[t]he Legislature could have reduced substantially the number of county splits had it employed the 10% overall population deviation (± 5%) that constitutes substantial population equality under controlling Supreme Court precedents." The Black Caucus also contends that "[t]he county's local legislative delegation effectively controls most important local government policies . . . through written and informal rules of the Legislature, [particularly] the rule of 'local courtesy'"; that "[t]he ± 1% restriction was adopted for an explicit partisan purpose, that is, ostensibly, as an attempt to avoid the type of partisan gerrymandering found unconstitutional in *Larios* [*v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd sub nom Cox v. Larios,* 542 U.S. 947, 124 S. Ct. 2806 (2004)]"; and that "[t]here is no compelling federal or state reason or rational basis for dividing" many of the counties among more districts than necessary to satisfy the 10% constitutional requirement or for increasing the size of the legislative delegations of the counties.

As the legal ground for summary judgment, the Black Caucus argues that the Equal Protection Clause prohibits "diluting the ability of county voters

independently to choose the members of their local legislative delegation more than is required to comply with the statewide standard of equal population among House and Senate districts." The Black Caucus clarified that it "do[es] not allege that the rule of local courtesy and other constitutional, statutory, and internal legislative rules and procedures governing passage of local laws violate the Equal Protection Clause." Instead, it challenges only the Acts themselves "(1) because they deny the fundamental rights of county residents to an equal and undiluted vote for the legislators who control the laws governing their local governments, and (2) because they are 'crazy quilts' that construct House and Senate districts with no rational basis."

In its prayer for relief, the Black Caucus sought a declaratory judgment that the Acts are unconstitutional, a preliminary and permanent injunction prohibiting the defendant Secretary of State of Alabama from enforcing the Acts, a reasonable opportunity for the Alabama Legislature to adopt and obtain preclearance of new redistricting plans, and attorney's fees.

We denied the second motion for summary judgment, and the Black Caucus filed a motion to alter or amend our order. In its motion, the Black Caucus argued that our order failed to comply with the requirements of Rules 52(a)(2) and 56(a) that we state findings of fact and conclusions of law to explain our order. The Black Caucus argued the State defendants had not disputed any of the material facts in its

second motion for partial summary judgment and that, by not identifying any in our initial order, we prejudiced the Black Caucus during discovery by not narrowing the disputed issues.

II. DISCUSSION

We divide our discussion in three parts. First, we explain why the Black Caucus lacks a legal basis to require this Court to alter or amend our order denying the second motion for partial summary judgment. Second, we explain why the Black Caucus has likely failed to state a colorable claim for relief and has certainly not established an entitlement to judgment as a matter of law. Third, we explain why, even if count three of the complaint could be read to state a claim, the Black Caucus has failed to establish that no genuine dispute of a material fact exists.

A. The Black Caucus Lacks a Legal Basis to Require this Three-Judge Court to Alter or Amend Its Judgment.

In its motion to alter or amend, the Black Caucus relied on three Federal Rules of Civil Procedure: Rule 52(a)(2) and Rule 56(a) as the substantive ground for the motion, and Rule 59(e) as the procedural vehicle. But neither Rule 52(a)(2) nor Rule 56(a) require us to state reasons for our denial of the motion, and Rule 59(e) is not the correct procedural vehicle for the relief requested.

First, Rule 52(a)(2) does not apply because the second motion for partial summary judgment filed by the Black Caucus was not a motion for an interlocutory injunction. Rule 52(a)(2) provides, "In granting or refusing an interlocutory injunction, the court must [] state the findings and conclusions that support its action." Fed. R. Civ. P. 52(a)(2). Our earlier order was interlocutory in nature, but it did not involve the denial of an injunction. The Black Caucus asked for a permanent and preliminary injunction as one form of relief, but did not cite the standard for the grant of a preliminary injunction, nor make any argument about that standard. The Supreme Court has explained that an "order denying summary judgment to a plaintiff who has requested injunctive relief," but who has taken "no practical step toward obtaining such relief," is not an order denying a preliminary injunction. *Goldstein v. Cox,* 396 U.S. 471, 475, 479, 90 S. Ct. 671, 673, 675 (1970). Like the plaintiffs in *Goldstein,* the Black Caucus requested an injunction as part of its prayer for relief, but it "filed no separate application for a preliminary injunction" and never "urged the appropriateness of temporary relief." *Id.* at 479, 90 S. Ct. at 675. Because our order was not an order refusing an interlocutory injunction, Rule 52(a)(2) did not require us to state findings of fact and conclusions of law to support our decision.

Second, Rule 56(a) counsels us, as a prudential matter, to state the reasons for our decision, but it does not require us to do so. Rule 56(a) provides, in part, "The court shall grant summary judgment if the

movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." Fed. R. Civ. P. 56(a). The text itself manifests the prudential nature of the rule. By contrast to the statement that a court "shall" grant a summary judgment if the movant meets the standard, Rule 56(a) provides only that a court "should" state on the record the reasons for its decision. *See id.* And the Advisory Committee notes further explain that the direction that courts should state reasons for their denial of a summary judgment serves prudential goals, including the facilitation of an appeal and subsequent trial proceedings, but that "[t]he statement on denying summary judgment need not address every available reason." Fed. R. Civ. P. 56(a) advisory committee's note to 2010 amendments. Because the requirement in the last sentence of Rule 56(a) is not mandatory, it did not require us to state the reasons for our denial of summary judgment.

Finally, we note that the Black Caucus used the inappropriate vehicle for its motion. Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of a judgment," but our order was not a judgment. Black's Law Dictionary defines judgment as "[a] court's final determination of the rights and obligations of the parties in a case ." Black's Law Dictionary (9th ed. 2009). And Rule 54(a) explains that the word "'[j]udgment' as used in these rules includes a decree

and any order from which an appeal lies." Our order did not constitute a final determination of the rights and obligations of the parties, and no appeal from that order is available. Direct appeals from a three-judge court lie only "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253. The Supreme Court has interpreted section 1253 to permit it to review interlocutory orders only when the orders grant or deny preliminary injunctions. *Goldstein,* 396 U.S. at 475, 90 S. Ct. at 674. As the Supreme Court explained in *Goldstein,* "an order denying summary judgment to a plaintiff who has requested injunctive relief," but who has taken "no practical step toward obtaining such relief," cannot be considered an order granting or denying a preliminary injunction. *Id.* at 475, 479, 90 S. Ct. at 673, 675. Because our denial of summary judgment was an interlocutory order, but not one that granted or denied a preliminary injunction, no appeal lies from that order. *See id.* And because no appeal lies from our order, it is not a judgment within the meaning of Rule 59(e).

B. The Black Caucus Likely Failed to State a Claim in Count Three.

Count three of the amended complaint likely fails to state a claim for two reasons. First, count three of the amended complaint, like count three in the first

complaint filed by the Black Caucus, fails to provide a judicial standard for the adjudication of the claim. Second, under any standard of adjudication, the Black Caucus has failed to explain how it is entitled to a judgment in its favor as a matter of law.

First, the Black Caucus has again failed to provide a standard by which we can evaluate its claim of partisan gerrymandering. In our order dismissing count three of the original complaint, we explained that, "[w]here a court 'ha[s] no standard by which to measure the burden [plaintiffs] claim has been imposed on their representational rights, [plaintiffs] cannot establish that the alleged political classifications burden those same rights.'" *See Vieth v. Jubelirer,* 541 U.S. 267, 313, 124 S. Ct. 1769, 1796 (2004) (Kennedy, J., concurring in the judgment). In its amended complaint, the Black Caucus states that, although "[t]he Supreme Court has not established a free-standing constitutional standard upon which claims of partisan gerrymandering can be based," "the Court has held that traditional or neutral districting principles may not be subordinated in a dominant fashion by either racial or partisan interests absent a compelling state interest for doing so, particularly where the traditional districting principle is embedded in the state constitution." But none of the cases the Black Caucus cites for this proposition are about partisan gerrymandering. *Shaw v. Reno,* 509 U.S. 630, 113 S. Ct. 2816 (1993), and *Bartlett v. Strickland,* 556 U.S. 1, 129 S. Ct. 1231 (2009), involved claims of racial, not political, gerrymandering. *See Bartlett,* 556

U.S. at 6, 129 S. Ct. at 1238; *Shaw,* 509 U.S. at 636, 113 S. Ct. at 2821. And the three-judge court in *Larios* considered only a one person, one vote challenge because it had already granted a summary judgment against the plaintiffs' claim of partisan gerrymandering. 300 F. Supp. 2d at 1322.

In his controlling concurrence in *Vieth,* Justice Kennedy specifically rejected the argument that partisan gerrymandering claims should be treated the same as racial gerrymandering claims. *Vieth,* 541 U.S. at 307, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment) ("That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. Politics is quite a different matter. A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." (citations omitted)). In the light of Justice Kennedy's statement, the Black Caucus cannot seriously contend that we should apply the racial gerrymandering standard to a partisan gerrymandering claim, and the Black Caucus has again failed to provide us the judicial standard we need to adjudicate its claim.

The failure of the Black Caucus to provide this Court an adjudicative standard for its new claim of partisan gerrymandering is exacerbated by the internal inconsistencies of its amended complaint. Although the amended complaint states that we should require a compelling justification from the State for its use of partisan classifications in the redistricting process, the complaint also repeatedly alleges that the State lacked a rational basis for its districting plans. The tension between these allegations underscores the failure of the Black Caucus to provide us the standard we required in our previous order.

Second, the Black Caucus has failed to establish that it is entitled to judgment as a matter of law. The Black Caucus argues that creating more equality among districts than is necessary to satisfy the Equal Protection Clause somehow violates the Equal Protection Clause when the effect is to dilute the votes of county residents for the members of their local legislative delegation. As support for this argument, the Black Caucus cites two decisions, *Vander Linden v. Hodges,* 193 F.3d 268 (4th Cir. 1999), and *DeJulio v. Georgia,* 290 F.3d 1291 (11th Cir. 2002), in which circuit courts confirmed that the one person, one vote requirement applies to local government when the persons who serve in local government are selected by popular election to perform governmental functions, *DeJulio,* 290 F.3d at 1295; *Vander Linden,* 193 F.3d at 272. In *Vander Linden,* the Fourth Circuit invalidated, under the one person one vote requirement, a delegation system in which local delegations of

legislators were statutorily responsible for a number of general county and governmental functions. 193 F.3d at 271, 281. In *DeJulio,* the Eleventh Circuit considered procedures for the consideration of local legislation in Georgia that are factually analogous to those present in Alabama and concluded that they did not violate the one person, one vote requirement. Specifically, the plaintiffs in *DeJulio* challenged the rule of local courtesy under which "local legislation [that] has received the requisite number of signatures of representatives and senators whose districts lie partially or wholly within the locality which the legislation affects[ ][ ] is ordinarily passed on a contested basis as a matter of local courtesy." *DeJulio,* 290 F.3d at 1293-94. In Georgia, like in Alabama, "[l]ocal courtesy is a custom, [ ] and is not provided for in either the House or Senate rules." *See id.* at 1294. The Eleventh Circuit concluded that a one person, one vote challenge to these procedures failed because "local delegations only make recommendations" and "[l]ocal legislation is not officially enacted until it is voted on by a majority of the full House and Senate and signed by the Governor." *Id.* at 1296.

The Black Caucus attempts to escape the reasoning of *DeJulio* by attacking the districts from which the local legislators are elected, as opposed to the systems under which the local delegations operate. Both *DeJulio* and *Vander Linden* involved challenges to the procedures for the enactment of local legislation. *See DeJulio,* 290 F.3d at 1292-93; *Vander Linden,* 193 F.3d at 270. But the Black Caucus has

not explained how its litigation strategy should alter our analysis under the Equal Protection Clause. *DeJulio* establishes that, when local legislation must be passed by the entire legislature and signed by the Governor, an informal rule of local courtesy like the one in Georgia does not violate the one person, one vote requirement of the Fourteenth Amendment because the government functions are performed by the Legislature as a whole. The amended complaint filed by the Black Caucus alleges that Alabama has the same kind of informal system of local courtesy. The Black Caucus has offered us no explanation for its argument that the district maps are somehow unconstitutional because they elect legislators who participate in a process that the Eleventh Circuit has previously explained does not violate the principle of one person, one vote. And the Black Caucus has cited no decision in which a court has concluded that the appropriate remedy for an equal protection challenge to a local legislative scheme is to redraw district lines for the entire legislature.

The Black Caucus has also failed to establish how its claim about the one person, one vote rights of county voters is in any way connected to its claim for partisan gerrymandering. The Black Caucus has not alleged that the state legislators acted with an invidious partisan purpose to affect local legislation. Instead, the Black Caucus alleges that the state legislators prioritized partisan interests over the state constitutional requirement that county boundaries be preserved. But the Black Caucus has not alleged that

the Fourteenth Amendment requires a federal court to enforce a state constitutional requirement like the whole county provision. To the extent that the Black Caucus has simply repackaged its claim that the districts violate the whole-county provisions of the Alabama Constitution as a partisan gerrymandering claim, we have already explained that we lack subject-matter jurisdiction to consider a claim that state officials violated state law. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 117, 104 S. Ct. 900, 917 (1984).

For all these reasons, we cannot conclude that the Black Caucus is entitled to a judgment as a matter of law. We entertain serious doubts that the Black Caucus has even stated a claim for which relief can be granted in count three of its amended complaint.

C. The Black Caucus Has Also Failed to Establish that No Genuine Issue of Material Fact Is Disputed.

Even if the Black Caucus had stated a claim for partisan gerrymandering upon which relief could be granted, genuine issues of material fact are in dispute. The Black Caucus asserts that it is undisputed that the two percent population deviation established by the Legislative Reapportionment Committee was "arbitrar[y] and impracticabl[e]"; that the two percent population deviation "was adopted for an explicit partisan purpose, . . . to avoid the type of partisan gerrymandering found unconstitutional in *Larios*"; that

the legislative maps were drawn "to promote the agenda of the partisan majority to maximize the number of seats statewide that Republicans will hold in the Legislature"; and that the comments of individuals who attended meetings of the Legislative Reapportionment Committee were "ignored by the Legislature." But the State defendants contend that the two percent population deviation established by the Legislative Reapportionment Committee was designed to "comply with the general constitutional mandate that districts be [] nearly equal in population to each other, without the need for absolute equality"; that the Legislative Reapportionment Committee was driven by obligations under the Voting Rights Act, but also took into account the concerns of legislators; that the Legislative Reapportionment Committee sought "to preserve communities of interest, which sometimes includes county lines," in a manner that would not violate the Voting Rights Act or the two percent population deviation; and that the Legislative Reapportionment Committee took into account the concerns raised at public hearings as best they could. The Black Caucus has not established that "there is no genuine dispute as to any material fact" with regard to the manner in which the legislative maps were crafted, *see* Fed. R. Civ. P. 56(a), and is not entitled to summary judgment on count three of its amended complaint.

III. CONCLUSION

We **DENY** the motion to alter or amend our judgment. We sua sponte **VACATE** our initial order denying the second motion for partial summary judgment and **SUBSTITUTE** this memorandum opinion and order. We **DENY** the second motion for a partial summary judgment for the reasons stated above.

DONE this 5th day of April, 2013.

/s/ William H. Pryor Jr.
UNITED STATES
CIRCUIT JUDGE
PRESIDING

/s/ W. Keith Watkins
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-CV-691 (Three-Judge Court)**
DEMETRIUS NEWTON, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-CV-1081 (Three-Judge Court)** (Filed Apr. 5, 2013)

THOMPSON, District Judge, concurring:

While I agree with the majority that the motion for summary judgment should be denied and I also agree with much of the majority's opinion, there are, however, parts with which I disagree and additional comments I wish to make. Therefore, I write separately to explain.

I.

Assuming that the "should" in Fed. R. Civ. P. 56(a) is, as stated by the majority, precatory rather than mandatory, I am concerned that it could be viewed as disingenuous to fault the *ALBC* plaintiffs[1] for invoking the rule and then to maintain that, in giving reasons now, the court is acting *sua sponte* and not (even a little bit) at the behest of the *ALBC* plaintiffs and pursuant to Rule 56(a)'s precatory "should." I also see no need, now that our reasons are public, to reach the conclusion that our order is not appealable pursuant to Fed. R. Civ. P. 54(a). Having said that, I turn to the merits.

II.

I begin by providing the following background facts that I have discerned from the record and which are explained only cursorily by the majority. Under the Alabama Constitution, "local" laws are distinguished from "general" laws: local laws are those that "appl[y] to any political subdivision or subdivisions of the state less than the whole" (including the laws at issue in this case, those affecting individual Alabama counties) and general laws are those that "appl[y] to the whole state." Ala. Const. art. IV, § 110.

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[1] For ease of discussion, I refer to plaintiffs Alabama Legislative Black Caucus, Alabama Association of Black County Officials, Bobby Singleton, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr. collectively as "the *ALBC* plaintiffs."

All state legislation, both general or local, must be enacted in the state legislature as a whole. Ala. Const, art. IV, § 44; *see also Hill v. Moody,* 207 Ala. 325, 93 So. 422, 424 (Ala. 1922). Thus, Alabama's counties do not have, or have only limited forms of, "home rule," as it is often called. *See generally* Jim Williams & Randolph Horn, Working Papers, *Local Self Government in Alabama,* 33 Cumb. L. Rev. 245 (2002-2003) (reviewing laws affecting local governance in Alabama and other states). In order for legislation affecting a single county to become law, no matter the extent to which the matter is wholly of local concern, it must be enacted by the entire state legislature, and generally as a constitutional amendment. *See, e.g.,* Ala. Const. amend. § 482 (authorizing Limestone county to "provide for the disposal of dead farm animals, and the excavating of human graves").

To carry out efficiently the task of managing the affairs of Alabama's 67 counties, the legislature has created the system of local delegations that is at the forefront of this case. Each Alabama county has a corresponding local delegation in both houses of the state legislature. First, legislation affecting a county originates with the county's local delegation, which, upon agreeing to a bill, then forwards it to the full legislature. Because local laws must start with local delegation approval, the *ALBC* plaintiffs refer to the delegations as having a "gate-keeping power over local laws." Pls.' Br. (Doc. No. 67) at 4. Once in the full legislature, an uncodified rule of so-called "local courtesy" is invoked. That is, the other members of the

legislature defer to the local delegation and allow the bill to pass without objection. The local courtesy rule is rarely violated. Lastly, the bill goes to the governor for signature, after which (assuming it is not vetoed, which, although rare, happens), it is law.

At issue in this case is the manner in which members of the counties' local delegations are chosen. A delegation consists of all legislators whose district boundaries include a part of the county, no matter how small that part is. For example, if one county is divided among two legislative districts, the representatives of both districts become members of that county's local delegation, even if one of the districts encompasses the vast majority of the county while the other contains only a small portion. Also, legislators are not limited to joining only a single county's delegation; rather, they join all delegations corresponding to the counties included in their districts. Once on a local delegation, a legislator casts a single vote.

In this case, the *ALBC* plaintiffs challenge, essentially, the fact that the local-delegations system results in inequalities of representation and power among county voters. That is, with respect to local laws affecting a single county, the voters within that county exercise varying degrees of influence on county affairs as a necessary consequence of all legislators in the county's delegation casting a single vote irrespective of how many county residents the legislator represents. For example, the *ALBC* plaintiffs point to Jefferson county, which, as Alabama's most populous

county, has been split among multiple legislative districts, some of which lay wholly within the county and some of which cross into neighboring counties. One district in Jefferson's delegation contains approximately 45,000 people total, approximately 200 of whom are in Jefferson county while the remaining 44,800 or so are in neighboring Shelby county. The *ALBC* plaintiffs contend, in essence, that affording these 44,800 Shelby residents power over the entirety of Jefferson county merely because they reside in a district with 200 Jefferson residents is unfair. They claim that the same is true in all other instances across the State where similar county splitting has occurred.

III.

It is against this backdrop that I find most troubling (and confusing) the *ALBC* plaintiffs' emphasis that they are attacking the redistricting "statutes" rather than the "systems under which local delegations have operated." Pls.' Br. (Doc. No. 67) at 4; *see also* Amended Compl. (Doc. No. 60) ¶ 59 (specifying that the *ALBC* plaintiffs do not claim that Alabama's "internal legislative rules and procedures" violate the one-person, one-vote requirement, but, rather, claim that the State's redistricting plans, which "dilut[e] the ability of county voters independently to choose the members of their local legislative delegation," violate the rule). (Indeed, the majority seems to be making the contrary point that the issue really is the

"systems" and not the redistricting "statutes." *Ante,* at 16.)

To me, the issue is both. It is the congruence of both the system and redistricting statutes that arguably brings about the alleged violation. Without the systems (under which the local delegations operate) in play, the statutes would not have the wrongful impact the *ALBC* plaintiffs claim. In fact, after noting that the object of their scorn is the redistricting "statutes," the plaintiffs go on to ask and answer the following: "[I]n light of the gate-keeping power local legislative delegations have over local laws that control important functions of government in Alabama, does splitting county boundaries violate the one-person, one-vote rights of county residents, absent a compelling federal or state reason for doing so? The answer is yes." Pls.' Br. (Doc. No. 67) at 4.

If, as the *ALBC* plaintiffs assert, the local delegations are gate-keepers; if this gate-keeping role constitutes a "governmental function" within the meaning of *Hadley v. Junior College Dist.,* 397 U.S. 50, 56 (1970); and if this gate-keeper role is so long-lasting and substantive that it amounts to a law, *Nashville, C. & St. L. Ry. v. Browning,* 310 U.S. 362, 369 (1940); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 168 (1970), then I think the *ALBC* plaintiffs may have a viable claim.[2] What I cannot discern from the current record

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[2] *See generally* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting*

(Continued on following page)

is just how substantive and critical this gate-keeper role is in practice in Alabama.[3] The evidence is not there, one way or the other. (The *ALBC* plaintiffs' factual contention, for example, that the confluence of these factors was the cause of the "failure of the Jefferson County's legislative delegation to re-enact its occupational tax, a delegation impasse that contributed to the county's bankruptcy," Pls.' Reply Br. (Doc. No. 77) at 6, is quite troubling.)[4] It is for this

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Rights Act, 102 Yale L.J. 105, 127 (1992) ("In some states the procedures [local delegations follow] are highly formalized; in others, they more closely resemble customs or practices than rules of law.").

[3] At one point in their brief, the *ALBC* plaintiffs state that the Georgia local-delegations system, as described in *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga. 2001) (Thrash, J.), *aff'd*, 290 F.3d 1291 (11th Cir. 2002), is "virtually the same" as Alabama's. Pls.' Br. (Doc. No. 67) at 3. At another point they seem to suggest that Alabama's local delegations perform a "governmental function." *See id.* at 4 ("local legislative delegations have [a gate-keeping power] over local laws that control important functions of county government"); Pls.' Reply Br. (Doc. No. 77) at 7 ("the county's local legislative delegation has more power over local government policies than do the county commissioners"). In contrast, the *DeJulio* court, in reaching its holding, said the Georgia delegations did *not* perform governmental functions. *DeJulio*, 127 F. Supp. 2d at 1295. I am therefore not sure if the *ALBC* plaintiffs are saying that the Georgia and Alabama systems are similar in that they have the same set up or in that they engage in the same practices or in all respects. The *ALBC* plaintiffs need to clarify this.

[4] *See also In re Jefferson Cnty.*, 484 B.R. 427, 434 (Bankr. N.D. Ala. 2012) (Bennett, J.) (describing the failure of the local delegation to replace the occupational tax, which "was actually

(Continued on following page)

reason (that the record is so factually undeveloped in this regard) as well as the reason that the *ALBC* plaintiffs have yet to make clear their claim (which, to be candid, seems to be evolving) that I concur in the denial of summary judgment.[5]

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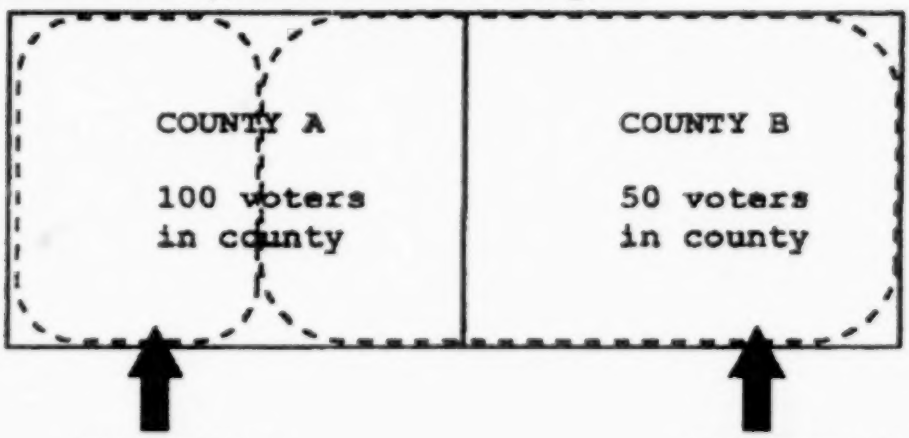
beyond the County's control," as a "major cause" of the bankruptcy).

[5] Another matter that I think needs clarification is what, precisely, is the nature of the voter inequality that the *ALBC* plaintiffs contend creates a constitutional problem? I can think of three theories. (To help illustrate them, I have added a figure on the next page.) I assume that the *ALBC* plaintiffs are relying on the first theory, but I could be wrong.



First, there is a difference of representational power among the voters of a single county with respect to legislation affecting that county. In the figure above, two legislators (those representing Districts 1 and 2) are the gate-keepers for legislation affecting County A, and they both cast a single vote in that regard, even though one is elected by 75 of the county's voters and the other by only 25 (plus 50 out-of-county voters). Therefore, among County A's voters, the 25 residing in District 2 have a 1:3

(Continued on following page)

IV.

I also take issue with the majority's suggestion that, because the majority foresees issues down the road with the *ALBC* plaintiffs' particular relief requested, there is reason to have "serious doubts" about the viability of their claim. *See ante,* at 17-18 (noting that the *ALBC* plaintiffs have "cited no decision in which a court has concluded that the appropriate remedy for an equal protection challenge to a local legislative scheme is to redraw district lines for the entire legislature"). If there is a viable claim and

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advantage over the 75 residing in District 1 with respect to legislation affecting their own county.

Second, depending on whether a voter resides in a district that lays entirely within a single county or a district that crosses county lines, the voter's representative is the gate-keeper for either a single county or multiple counties. In the figure above, while both Districts 1 and 2 contain 75 voters, the voters of District 1 are represented by a legislator who is a gate-keeper for a single county (County A) while the voters of District 2 are represented by a legislator who is a gate-keeper for two counties (both Counties A and B).

Third, as a consequence of the prior, there is a difference in the numbers of actual people for whom representatives are gate-keepers. That is, some voters, through their representative, are the gate-keepers for legislation affecting themselves and their neighbors even though those neighbors are so for themselves only. In the figure above, because District 2's legislator is the gate-keeper for both Counties A and B and District 1's legislator is the gate-keeper for County A alone, consequently, the 75 voters of District 2 can affect legislation for 150 people (1:2) while the 75 voters of District 1 can do so for only 100 people (1:1⅓), and, of course, the latter 100 people are included in the prior 150 people.

if the evidence reflects that the claim has merit, then I think that it will be up to this court to find the remedy. *Cf. Citizens United v. Fed. Election Comm'n,* 130 S. Ct. 876, 893 (2010) ("The parties cannot . . . prevent[ ] the Court from considering certain remedies if those remedies are necessary to resolve a claim."); *Bowsher v. Synar,* 478 U.S. 714, 781-82 (1986) (Blackmun, J., dissenting) (where the court is faced with a constitutional violation created by "two conjunctively unconstitutional statutory provisions," if the court is to remedy the violation by choosing one of the two provisions to enjoin, the court "surely [should] make that determination as best as [it] can instead of leaving the selection to the litigants"). I think it is premature to say that redistricting is inappropriate, for it could very well be that redistricting is the least intrusive and most narrowly tailored remedy should there be a violation. One just cannot say at this time.[6]

DONE, this the 5th day of April, 2013.

/s/ Myron H. Thompson
UNITED STATES
DISTRICT JUDGE

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[6] I share fully the majority's confusion regarding whether the claim is brought under the First Amendment, the Fourteenth Amendment, or some form of the two together. *See ante,* at 17.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-691 (Three-Judge Court)
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	CASE NO. 2:12-CV-1081 (Three-Judge Court)

MEMORANDUM OPINION AND ORDER

(Filed Dec. 26, 2012)

Pending before this three-judge court are three motions filed in *Alabama Legislative Black Caucus, et al. v. Alabama,* no. 2:12-cv-691, before its consolidation with *Newton v. Alabama,* no. 2:12-cv-1081. The first is a motion for partial summary judgment and for preliminary and permanent injunction (Doc. # 7) filed by the Alabama Legislative Black Caucus, Bobby

Singleton, Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner Jr., and Jiles Williams Jr. The second is a motion for judgment on the pleadings (Doc. # 29) filed by the State of Alabama and Beth Chapman in her official capacity. The third is an oral motion made at a hearing on the first two motions where the Black Caucus moved for leave to amend count three of its complaint.

These three motions are now ripe for our decision. We deny the motion for partial summary judgment and for preliminary and permanent injunction filed by the Black Caucus and grant the motion for judgment on the pleadings filed by the State defendants as to count one of the complaint filed by the Black Caucus. We deny the motion for judgment on the pleadings as to count two of the complaint filed by the Black Caucus. We also dismiss without prejudice and grant the Black Caucus leave to amend count three of its complaint.

I. BACKGROUND

This matter arises from the decennial redistricting of the Alabama Legislature. A special session of the Alabama Legislature convened to establish new districts for the House of Representatives and the Senate. The Joint Legislative Reapportionment Committee established guidelines that restricted population deviations in the new districts to two percent. On May 31, 2012, Governor Robert Bentley

signed into law Acts 2012-602 and 2012-603, which established the new districts.

After Governor Bentley signed the Acts, the Black Caucus filed a complaint against the State of Alabama and Beth Chapman, in her official capacity as the Secretary of State of Alabama. That complaint asserted three counts: violation of the guarantee of one-person, one-vote under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 2; dilution and isolation of the strength of black votes in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Fourteenth Amendment, U.S. Const. Amend. XIV, and the Fifteenth Amendment, U.S. Const. Amend. XV; and partisan gerrymandering in violation of the First Amendment, U.S. Const. Amend. I. The Black Caucus moved for partial summary judgment and preliminary and permanent injunctive relief on count one of its complaint.

The State defendants moved to dismiss or, in the alternative, to stay the action until Attorney General Luther Strange obtained either administrative or judicial preclearance of the new districts under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We granted the motion of the State defendants to stay the matter until either the Attorney General of the United States, Eric Holder, or the United States District Court for the District of Columbia decided whether to preclear the districts. After Attorney General Holder precleared the new districts, we lifted the stay of the action and denied the motion to

dismiss filed by the State defendants. The State defendants then filed an answer to the complaint and a motion for judgment on the pleadings with respect to all three counts.

After the hearing on the latter motions, another complaint was filed about the new districts. Demetrius Newton, the Alabama Democratic Conference, Stacey Stallworth, Framon Weaver Sr., Rosa Toussaint, and Lynn Pettway filed a complaint against the State of Alabama; Robert Bentley, in his official capacity as the Governor of Alabama; and Beth Chapman, in her official capacity as the Secretary of State of Alabama. The Newton plaintiffs asserted three counts in their complaint: violation of section 2 of the Voting Rights Act; racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments; and violations of constitutional and statutory rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After the Newton action was assigned to this three-judge court, we determined that the Black Caucus action and the Newton action involve common questions of law and fact and consolidated them to avoid unnecessary repetition and confusion. *See* Fed R. Civ. P. 42(a)(2). The State defendants have not yet been served or appeared in the second action.

II. DISCUSSION

A judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is to be granted only "when no issues of material fact exist, and the moving party

is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." *Cunningham v. Dist. Att'y's Office for Escambia Cnty.*, 592 F.3d 1237, 1255 (11th Cir. 2010) (quoting *Andrx Pharm., Inc. v. Elan Corp.*, 421 F.3d 1227, 1232-33 (11th Cir. 2005)). "We must accept the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party." *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). And a summary judgment is to be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. Guarantee of One-Person, One-Vote Under the Fourteenth Amendment

In count one of its complaint, the Black Caucus contends that the new districts violate the guarantee of one-person, one-vote under the Fourteenth Amendment, but its complaint fails to allege facts to support this claim for relief. The complaint filed by the Black Caucus alleges that, because the Legislature chose to maintain population deviations at below two percent, "[the districts] violate the one-person, one-vote requirement of the Equal Protection Clause by restricting allowable population deviations more than is practicable to comply with the whole-county provisions in the Alabama Constitution and by failing to comply with those whole-county provisions to the

extent practicable." *See* Ala. Const. Art. IX, §§ 198-200. In other words, the complaint filed by the Black Caucus alleges that the new districts have too little deviation in population equality in violation of the state constitution. Nothing in these allegations suggests that the new districts violate the guarantee of one-person, one-vote under the Fourteenth Amendment.

The odd complaint of the Black Caucus that the new districts are too equal in population fails to address a concern of the Fourteenth Amendment. The Supreme Court has explained that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds v. Sims,* 377 U.S. 533, 560-61, 84 S. Ct. 1362, 1381 (1964). For that reason, "the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis." *Id.* at 576, 84 S. Ct. at 1389. The Fourteenth Amendment required Alabama to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577, 84 S. Ct. at 1390. State legislatures have some flexibility in the creation of new districts, *see id.* at 578, 84 S. Ct. at 1390, and "an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations" that "are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth

Amendment so as to require justification by the State," *Brown v. Thomson,* 462 U.S. 835, 842, 103 S. Ct. 2690, 2696 (1983) (internal quotation marks omitted).

The pleadings establish a presumption that the new districts satisfy the guarantee of one-person, one-vote, and the complaint filed by the Black Caucus alleges no facts to rebut that presumption. Because a deviation in population equality of even as much as ten percent is "considered to be of prima facie constitutional validity," *see Connor v. Finch,* 431 U.S. 407, 418, 97 S. Ct. 1828, 1835 (1977); *see also Brown,* 462 U.S. at 842, 103 S. Ct. at 2696, a deviation of less than two percent in population equality, as the complaint filed by the Black Caucus alleges, easily establishes a presumption that the new districts satisfy the guarantee of one-person, one-vote. The Black Caucus fails to rebut that presumption when it complains that the new districts have too much equality in population.

To the extent that the complaint filed by the Black Caucus alleges that state officials violated state law, we lack subject-matter jurisdiction to consider it. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 117, 104 S. Ct. 900, 917 (1984). The Supreme Court has held that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." *Id.* "The Eleventh Amendment acts as a jurisdictional bar," *see Doe v. Moore,* 410 F.3d 1337, 1349 (11th Cir.

2005), so we "cannot proceed at all in any cause," *see Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1869).

The Black Caucus interprets *Sims v. Baggett,* 247 F. Supp. 96 (M.D. Ala. 1965), to render the whole-county provisions of the Alabama Constitution enforceable as a matter of federal law, but that decision stands for no such proposition. When it addressed the whole-county provisions of the Alabama Constitution, the court in *Sims* ruled that the provisions did not facially violate the Constitution of the United States so as to be "wholly inoperative." *Id.* at 101. The court explained its duty to respect state law in remedying a violation of the federal Constitution insofar as state law remained operative. *Id.* at 102-03. But the court did not order the State defendants against their will, nor could it have, to comply with those provisions of the state constitution. *See id.*; *Pennhurst,* 465 U.S. at 117, 104 S. Ct. at 917. The court instead enforced only the guarantee of the Equal Protection Clause that "one person's vote must be worth as much as that of any other person, so far as is practicable." *Sims,* 247 F. Supp. at 99.

Nor do we find persuasive the citation to the decision of the Supreme Court in *Bartlett v. Strickland,* 556 U.S. 1, 6, 129 S. Ct. 1231, 1238 (2009), where the Supreme Court addressed the intersection of section 2 of the Voting Rights Act and the whole-county provision of the North Carolina Constitution. In *Bartlett,* the Supreme Court of North Carolina had held that the boundaries of a district of the North Carolina House of Representatives conflicted with the

whole-county provisions of that state constitution. *Pender Cnty. v. Bartlett,* 649 S.E.2d 364, 376 (N.C. 2007). The Supreme Court of North Carolina also had held that, on the facts before it, the application of the North Carolina whole-county provision would not violate section 2 of the Voting Rights Act. *Id.* at 375-76. The Supreme Court affirmed the decision of the Supreme Court of North Carolina and held that there was no conflict between section 2 of the Voting Rights Act and the North Carolina whole-county provision as applied to the facts before it. *Bartlett,* 556 U.S. at 14-15, 129 S. Ct. at 1243. Unlike the parties in *Bartlett,* the Black Caucus has not availed itself of the state courts to adjudicate the violation of state law alleged in its complaint. *Bartlett* in no way supports the argument that we may enforce provisions of a state constitution against state defendants.

As to count one, we grant the motion for judgment on the pleadings in favor of the State defendants and deny the motion of the Black Caucus for partial summary judgment and for preliminary and permanent injunction. The population deviation in both sets of the districts is de minimis and the complaint filed by the Black Caucus fail[illegible] to allege any facts that would rebut the presumption that those districts satisfy the guarantee of one-person, one-vote under the Fourteenth Amendment. *See Connor,* 431 U.S. at 418, 97 S. Ct. at 1835; *see also Brown,* 462 U.S. at 842, 103 S. Ct. at 2696. A federal court is not the forum for the adjudication of a claim under state law against state defendants. *Pennhurst,* 465 U.S. at

117, 104 S. Ct. at 917. The courts of Alabama are open to entertain suits under state law, but the Eleventh Amendment bars us from remedying a complaint that state officers violated state law.

B. Dilution and Isolation of the Strength of Black Votes Under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments

In count two of its complaint, the Black Caucus contends that the new districts were adopted with the intent to dilute and isolate the strength of black votes in violation of section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. When we evaluate the sufficiency of a complaint of intentional discrimination in legislative redistricting, we consider the several factors articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89, 117 S. Ct. 1491, 1502-03 (1997), which include "[t]he impact of the official action"; "[t]he historical background of the [legislature's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history," *Arlington Heights*, 429 U.S. at 266-68, 97 S. Ct. at 564-65. The Black Caucus alleges that the Alabama Legislature intentionally packed black voters into black-majority districts to "minimiz[e] the ability of African Americans to form coalitions with white voters to elect

legislators of their choice" and to "politically segregat[e] the elected representatives of African-American voters and [to] minimiz[e] their ability to participate in the legislative process and to influence the outcomes of legislation." The Black Caucus alleges that the impact of the districts "bears more heavily on one race than another" because the Acts "unnecessarily maximiz[ed] or 'pack[ed]' [ ] 27 House districts and 8 Senate districts with majority-black voting-age populations" and because the districts "are designed to include 6 more white, Republican members in the Jefferson County Local Legislative Delegation than are required by the county's population, thus purposefully . . . diluting black voting strength in the local legislative delegation." *See id.* at 266, 97 S. Ct. at 564 (internal quotation marks omitted). The Black Caucus invokes "[t]he historical background of the decision" when it alleges that the districts "purposefully perpetuate and attempt to restore Alabama's historical policy of segregating African Americans in party politics." *See id.* at 267, 97 S. Ct. at 564. And the Black Caucus alleges that the Alabama Legislature "[d]epart[ed] from the normal procedural sequence" when it established the two percent population deviation for the new districts and ignored the whole-county provisions of the Alabama Constitution. *See id.* "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266, 97 S. Ct. at 564.

The Black Caucus has "state[d] a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). Count two alleges facts that correspond with the factors described in *Arlington Heights.* When we rule on a motion for judgment on the pleadings, "[w]e must accept the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party." *Cannon,* 250 F.3d at 1301.

Although the State defendants offer alternative reasons for the boundaries of the new districts, these alternative reasons do not establish that the complaint filed by the Black Caucus fails as a matter of law. The State defendants contend that the districts were drawn to remedy the "unconstitutional[ ] mal-apportion[ment]" that existed after the 2010 Census; to create "substantial equality among the various districts" following the decision in *Larios v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *aff'd sub nom Cox v. Larios,* 542 U.S. 947, 124 S. Ct. 2806 (2004), which held that population deviations below ten percent do not provide states with a safe harbor from challenges about the guarantee of one-person, one-vote, *id.* at 1340-41; to comply with sections 2 and 5 of the Voting Rights Act by moving more black voters into majority-black districts to avoid "weakening the voting strength of the African-Americans in those districts" in the light of the 2010 Census; to avoid a complaint of "systemic overpopulation of white-majority districts and underpopulation of black-majority districts," *see*

Montiel v. Davis, 215 F. Supp. 2d 1279, 1286 (S.D. Ala. 2002); and to avoid a complaint of systemic packing of districts based on partisanship, *see Gustafson v. Johns,* 434 F. Supp. 2d 1246 (S.D. Ala. 2006). In a nutshell, the State defendants contend that the new districts respect the Constitution and federal law and that the Acts unpacked districts to eliminate alleged racial and partisan discrimination. Although proof of these legislative purposes, if we were to credit it, would rebut a claim of invidious discrimination, a motion for judgment on the pleadings is not the vehicle for the resolution of conflicting evidence.

The pleadings also present disputed issues of fact that preclude a judgment on the pleadings on the alternative ground of the State defendants that no valid remedy exists for the claim raised in count two. The Black Caucus has alleged enough facts that, if proven to be true, could entitle it to relief. *See Horsley v. Feldt,* 304 F.3d 1125, 1131 (11th Cir. 2002). The State defendants respond that there is no remedy for the claim of vote dilution because "[a]ny remedy that would favor the interests of African-American voters by diluting the votes in white majority districts would be as unlawful as a remedy that favored the interests of white voters by diluting the votes in black-majority districts." "[W]hen material issues of fact are raised by the answer and the defendant[s] seek[ ] judgment on the pleadings on the basis of this matter, [their] motion cannot be granted." 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1368 at 253-54 (2004)).

C. Partisan Gerrymandering

In count three of its complaint, the Black Caucus alleges that the Alabama Legislature engaged in partisan gerrymandering when it created the new districts, but its complaint fails to identify a standard by which we can evaluate that claim. *See Vieth v. Jubelirer,* 541 U.S. 267, 313, 124 S. Ct. 1769, 1796 (2004) (Kennedy, J., concurring in the judgment). Although a claim of partisan gerrymandering is justiciable, *Davis v. Bandemer,* 478 U.S. 109, 143, 106 S. Ct. 2797, 2816 (1986), one problem for the Black Caucus is that a majority of the Supreme Court so far has been unable to identify a judicial standard for a claim of partisan gerrymandering, *see Vieth,* 541 U.S. at 334-35, 124 S. Ct. 1809-10 (Stevens, J., dissenting) (proposing a standard under which district maps violate the Equal Protection Clause "when partisanship, like race, has played too great of a role in the districting process"); *id.* at 362, 124 S. Ct. at 1825 (Breyer, J., dissenting) (proposing a standard that, at minimum, would encompass "gerrymandering that leads to entrenchment [as] an abuse that violates the Constitution's Equal Protection Clause"); *id.* at 347-50, 124 S. Ct. at 1817-19 (Souter, J., dissenting) (proposing a five-factor test: "First, the resident plaintiff would identify a cohesive political group to which he belonged"; "[s]econd, a plaintiff would need to show that the district of his residence paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly"; "[t]hird, the plaintiff would need to establish specific

correlations between the district's deviations from traditional districting principles and the distribution of the population of his group"; "[f]ourth, a plaintiff would need to present the court with a hypothetical district including his residence"; "[f]ifth, and finally, the plaintiff would have to show that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group"). And a plurality of the Court has declared the task a dead end, *see id.* at 306, 124 S. Ct. at 1792 (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Thomas, JJ) ("Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application."). In its complaint, the Black Caucus alleged that this claim is based on the First Amendment, but in briefs and at the hearing on these motions, the Black Caucus contended that this claim is based on the Equal Protection Clause of the Fourteenth Amendment. Where a court "ha[s] no standard by which to measure the burden [plaintiffs] claim has been imposed on their representational rights, [plaintiffs] cannot establish that the alleged political classifications burden those same rights." *Id.* at 313, 124 S. Ct. at 1796 (Kennedy, J., concurring in the judgment).

At the hearing, the Black Caucus moved for leave to amend count three to allege more facts and constitutional grounds to support its claim of political gerrymandering and to identify a judicial standard by which we can adjudicate the claim. Because count three fails to identify a judicial standard for the

adjudication of a claim of political gerrymandering, we dismiss count three without prejudice and grant the Black Caucus leave to amend its complaint. And because we dismiss count three without prejudice, we deny as moot the motion by the State defendants for judgment on the pleadings as to count three.

III. CONCLUSION

On consideration of the motions, replies, and response (Docs. # 7, 29, 30, 32, 35, 39) as well as supporting and opposing authority, it is ORDERED that the motion by the Black Caucus for partial summary judgment and for preliminary and permanent injunction as to count one of its complaint is DENIED. The motion by the State defendants for judgment on the pleadings as to count one of the complaint filed by the Black Caucus is GRANTED. The motion by the State defendants for judgment on the pleadings as to count two of that complaint is DENIED. Count three of that complaint is DISMISSED WITHOUT PREJUDICE. We GRANT the Black Caucus leave to amend its complaint within 21 days from the date of this order. The motion by the State defendants for judgment on the pleadings as to count three of that complaint is DENIED AS MOOT.

DONE this 26th day of December, 2012.

/s/ William H. Pryor, Jr.
UNITED STATES CIRCUIT
JUDGE PRESIDING

/s/ W. Keith Watkins
CHIEF UNITED STATES
DISTRICT JUDGE

/s/ Myron H. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS; BOBBY SINGLETON; ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS; FRED ARMSTEAD, GEORGE BOWMAN, RHONDEL RHONE, ALBERT F. TURNER, JR., and JILES WILLIAMS, JR., individually and on behalf of others similarly situated,	*	
Plaintiffs,	*	Civil Action No.
v.	*	2:12-CV-691-WKW-MHT-WHP
THE STATE OF ALABAMA; JIM BENNETT in his official capacity as Alabama Secretary of State,	*	(3-judge court)
Defendants.	*	
ALABAMA DEMOCRATIC CONFERENCE et al.,	*	
Plaintiffs,	*	Civil Action No.
v.	*	2:12-cv-1081-WKW-MHT-WHP
THE STATE OF ALABAMA et al.,	*	(3-judge court)
Defendants.	*	

ALBC PLAINTIFFS' NOTICE OF APPEAL FROM FINAL JUDGMENT

Notice is given that plaintiffs Alabama Legislative Black Caucus, Bobby Singleton, Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr., individually and on behalf of all residents of Alabama counties whose boundaries have been split among more House and/or Senate districts than are necessary to satisfy the Fourteenth Amendment requirement of statewide substantial population equality and the Voting Rights Act, and on behalf of all African-American voters of Alabama, appeal to the Supreme Court of the United States from the final judgment entered in this action on December 20, 2013, Doc. 205.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: January 6, 2014.

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Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. section 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. section 1973c:

> (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the

District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the

sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

MOTION

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
APR 21 2014
OFFICE OF THE CLERK

No. 13-895

In the
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED (RESTATED)

The district court's decision does not implicate the questions set forth in the jurisdictional statement for several reasons. First, Alabama's local delegations do not "exercise general governing authority over counties." J.S. i. Second, all three judges below agreed that the plaintiffs have offered no standard to distinguish necessary population differences relating to local delegations from "unnecessary" ones. *Id.* See J.S. App. 315, 404. Third, the new districts do not "pack[]" black voters in districts or otherwise discriminate on the basis of race.

In light of the record, this appeal actually presents the following questions:

County-splitting Claim:

1. Whether the district court correctly concluded that the ripeness doctrine deprived it of subject-matter jurisdiction, given that the relevant Legislature will not be elected until November 2014 and will not adopt any relevant rules regarding local legislation until 2015.

2. Whether, in the alternative, the district court correctly concluded that the standing doctrine deprived it of subject-matter jurisdiction, given that the plaintiffs offered no evidence that a cognizable claim was redressable through their requested relief.

3. Whether, in the alternative, the district court correctly determined, under the specific facts prof-

fered by the plaintiffs, that these particular local delegations do not trigger the one-person, one-vote rule.

Racial Gerrymandering Claim:

1. Whether, after a four-day bench trial, the district court clearly erred by crediting the testimony of the redistricting plan's drafters and determining as a factual matter that race was not the predominant motivating factor behind the plans?

PARTIES TO THE PROCEEDING

All parties are listed in the jurisdictional statement.

There were two groups of plaintiffs below, and the other group has also appealed in Appeal No. 13-1138. The plaintiffs in the other appeal expound on the racial classification claim cursorily addressed on pages 39 and 40 of the jurisdictional statement in this case, and the defendants have a more comprehensive response to that issue there.

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MOTION TO DISMISS OR AFFIRM

The Appellees in this matter—Alabama, its Secretary of State, and the co-chairs of its Legislature's Reapportionment Committee—respectfully ask this Court to summarily affirm the judgment below.

The ALBC plaintiffs seek to revive two claims in their appeal, neither of which has legal or factual merit. First, although they claim that the redistricting plans "unnecessar[ily]" split counties, the plaintiffs provide no guidance as to what splits are "necessary" and what splits are "unnecessary." The district court offered three independent and equally valid reasons the plaintiffs cannot prevail on this claim. Each of these grounds is tied to this case's particular facts, and each is tied to jurisprudential problems created by litigation decisions these particular plaintiffs have made. Second, the plaintiffs claim that the State of Alabama's entire legislative redistricting plan is unconstitutional because it is purportedly motivated by racial considerations. The district court held a four-day bench trial on this claim and found as a matter of fact that race was not the predominant factor behind the plan. The Department of Justice investigated this claim as part of Alabama's preclearance submission under Section Five of the Voting Rights Act and also found it to be without merit. The plaintiffs have not even argued that these findings were clearly erroneous. This Court should affirm for the reasons expressed here and in the motion to affirm in the companion appeal, Appeal No. 13-1138.

STATEMENT OF THE CASE

The plaintiffs' statement overlooks key facts that undermine their claims, including live testimony that the district court expressly credited. The district court's record-specific fact-findings are uniquely suited for summary affirmance.

I. The Legislature drew the new maps to comply with federal law and the wishes of incumbent legislators.

The district court expressly found that race was not the predominant motivation behind Alabama's plans. J.S. App. 86, 93, 105, 129-33, 140, 143, 151, 159, 167, 169, 170, 172. Thus, the plaintiffs are wrong, as a factual matter, when they say that "[t]he drafters of Alabama's 2012 House and Senate redistricting plans . . . drew plans with the predominant purpose of maintaining [black] supermajority percentages." J.S. 3.

There may be additional facts that are relevant to the plaintiffs' racial gerrymandering claim. For example, some of the changes that the plaintiffs allege "reduce[] [African-Americans'] ability to influence the outcome of legislative elections," J.S. 17, were themselves proposed by African-American legislators. *E.g.*, J.S. App. 30-31, 35-36, 65. These facts are discussed in more detail in the defendants' motion to affirm in Appeal No. 13-1138, which was filed by another group of plaintiffs that challenged the State of Alabama's legislative districts.

A. The Legislature strictly complied with one-person one-vote, which limited opportunities for manipulation or gamesmanship.

The 2010 census revealed that Alabama's existing legislative districts had become grossly malapportioned. Under this Court's precedents, the Legislature had an obligation to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The Alabama Legislature created a redistricting committee that held public hearings at 21 locations in the state, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. J.S. App. 25-27, 30-36. The Committee ultimately developed proposals to redistrict the legislature, which were enacted in substantial form on party-line votes. J.S. App. 58-59. They were submitted for preclearance under Section Five of the Voting Rights Act and approved by the U.S. Department of Justice. J.S. App. 61, 162-63, 183.

After listening to four days of live witness testimony about this process, the district court found as a matter of fact that "the main priority of the Legislature was to comply with the constitutional mandate of one person, one vote." J.S. App. 142. "[T]he consistent testimony of [the plans' drafters] established that the constitutional requirement of one person, one vote trumped every other districting principle." J.S. App. 151. *See also* J.S. App. 94-105 (recounting testimony); J.S. App. 105 (expressly crediting testimony). "Above all," the Legislature's goal was to

"create more equality among districts throughout the State." J.S. App. 144.

To achieve its primary goal of population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See* J.S. App. 28. The drafters adopted this 2% deviation figure—which allows for plus or minus 1 percent deviation from the "ideal" district—for essentially three reasons.

First, that deviation represents stricter compliance with one-person, one-vote than the State's last two controversial redistrictings, where the maps allowed deviations of up to 10%. J.S. App. 27-28. As the lower court explained, the Democrat-controlled legislature in 2001 had engaged in a "successful partisan gerrymander" by using the 10% deviation to "systematically under-populate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." J.S. App. 18, 145. *See* J.S. App. 17-25 (recounting history of the 2001 gerrymander). The partisan gerrymander meant that, with just 51% of the state-wide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. J.S. App 24. The use of a 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." J.S. App. 146. It also "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." J.S. App. 144-45.

Second, the chair of the legislative redistricting committee testified, and the district court expressly found, that "the Committee wanted to avoid future litigation about compliance with the requirement of

one person, one vote." J.S. App. 94. The chair's concerns were well-founded. A three-judge district court in the Eleventh Circuit had previously cast doubt on the presumptive constitutionality of a 10% deviation. *See* J.S. App. 28-29 (discussing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947, 124 S.Ct. 2806 (2004)). And the Democrats' partisan gerrymander in 2001 had been the subject of controversy and litigation because of the population disparities between districts. *See* J.S. App. 4-5.

Third, the 2% deviation represents the best practices of other States. *See* J.S. App. 29-30. *See also* J.S. App. 106-107 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. J.S. App. 29-30.

B. The Legislature split counties for innocuous reasons, having to do with population equality and the requests of incumbents.

The plaintiffs have *never* proposed a competing state-wide redistricting plan with an overall deviation in population of 2 percent or less. *See* J.S. App. 146. Instead, the plaintiffs contend that the State should have prioritized county boundaries over population equality. *See* J.S. 30-31, 38-39. And they are effectively arguing that federal law required the Legislature to maintain the 2001 partisan gerrymander that systematically underpopulated and overpopu-

lated certain districts. *See* J.S. 38 (complaining that the use of "±1% restriction on all House and Senate districts systematically increased the instances in which" counties were split).

Nonetheless, it is undisputed that the one-person one-vote rule makes it, as the plaintiffs put it, "impossible" to draw *any* legislative plan in Alabama that does not split a significant number of counties, regardless of the deviation one uses. J.S. 7. The maps adopted after the last two censuses, which used a more lenient 10% disparity between districts, prove the point. *See* Doc. 76 at 4-5. The 1993 maps split 32 counties in the Senate and 36 counties in the House, and the 2001 plans split 31 counties in the Senate and 39 counties in the House. *See id.* Meanwhile, the plans at issue here split 33 counties in the Senate and 50 in the House. *See id.*

The district court expressly found that these county splits were motivated by efforts "to comply with the overall deviation in population of 2 percent" and "to further the interests of incumbents." J.S. App. 57. For example, the plaintiffs complain about "House District 61, which contains only 12 residents of Greene County (0.03%)." J.S. 11. But the plan's drafters explained at trial, and the district court expressly found, that Greene County was split simply because the incumbent representative from House District 61 requested it. He "asked to have his district include a portion of Greene County in which he owned property" because "he might move to that property in the future." J.S. App. 57. "[T]he representative whose district had previously included that property agreed to a change in which 12 people were

moved." J.S. App. 57. This is the stuff of routine legislative compromise.

II. The relevant rules concerning local delegations will not be proposed or established until January 2015.

The plaintiffs are challenging the effect that Alabama's electoral maps will have on local delegations after the first election conducted under those maps in November 2014. *See* J.S. 33. The plaintiffs have assumed that the courts can discern how the local delegations will operate when that Legislature convenes. But the facts do not bear out their assumption. The relevant rules regarding local delegations will not be crafted until after that election, and until then the courts cannot know what those rules will be. J.S. App. 116.

A few facts about the Alabama Legislature provide important context. As the district court explained, each member of the Legislature is elected to the same four-year term, so each stands for election, every four years, "on the same day." J.S. App. 280. The term of each current legislator is set to expire the day after the election in November 2014, *see id.* at 300-01, and there is no guarantee that any particular legislator will be re-elected to the new four-year term that will begin at that time.

Each new Legislature sets the procedural rules that will govern its four-year term during a constitutionally mandated "organizational session" that occurs during the January following the election. J.S. App. 280 (citing Ala. Const. art IV, §48.01). Critically for present purposes, the district court found that

during this opening session, the separate houses adopt their respective "rules for local legislation, including the use of local delegations." J.S. App. 282. The separate houses also use this session to appoint "'standing committees of the senate and house of representatives for the ensuing four years.'" *Id.* at 280 (quoting Ala. Const. art IV, §48.01). These include the committees that address local legislation. *Id.* at 282.

The fact that these rules and committees are created at the beginning of each Legislature's term means they dissolve at the end of the preceding session. *See* J.S. App. 282, 299 (citing Rules of Senate of Alabama, Alabama State Senate, *available at* http://www.legislature.state.al.us/senate/senaterules/senaterulesindex.html (last visited Apr. 17, 2014)). As the district court put it, these rules and committees "cease to exist" when the four years have run. J.S. App. 282. It is then up to the next Legislature to "adopt[] a system," in its own organizational session, to govern its own term. *Id.* Thus, although the "rules for local legislation that have been adopted by each Legislature have been fairly consistent over the last twenty years," they are not set in stone, and must be affirmatively adopted with each new Legislature. *Id.* at 282-83. "[N]ew local legislative committees have been created." *Id.* at 283. The House has "created new local delegation committees," and the Senate "has increased the number of standing committees." *Id.*

The district court explained that the plaintiffs "offered no evidence to support their assertions that the local delegations exist continuously without any action from the Legislature at the organizational ses-

sion." *Id.* at 290. Thus, the plaintiffs were simply wrong when they repeatedly insisted to the district court that "legislators are assigned to local legislative delegations *by statute*, not by internal rules of the Legislature." Doc. 67 at 4.

All this means that there is currently nothing for the plaintiffs to challenge. As the district court explained, "we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured." J.S. App. 300. Indeed, we do not even know who the members of that Legislature will be.

III. Alabama citizens do not elect local delegations, and local delegations do not exercise governmental authority over counties.

Two additional facts about the local delegations are relevant to the county-splitting claim.

First, as a consequence of each Legislature's duty to implement its own rules during its organizational session, Alabama citizens do not vote for members of local delegations in any formal way. Citizens simply vote for the representatives assigned to their districts. *See* J.S. App. 337. Because the organizational session has not occurred at the time of the election, citizens do not know, when they cast their ballots, how the local delegations will work or even if the newly elected Legislature will choose to use local delegations. *See id.* Thus, as the district court found below, "there can be no dispute that both members of committees and local delegations are selected

through a process that occurs after the election of the legislators." *Id.*

Second, the plaintiffs are wrong when they assert that "local legislative delegations . . . exercise general governing authority over counties." J.S. i. As the district court explained, it is certainly true that "the Constitution of Alabama limits the power of local governments." J.S. App. 280.[1] But it is "the Alabama Legislature," not the local delegations, that bears ultimate responsibility for local legislation. *Id.* Although the Legislature traditionally has used local delegations and committees "to facilitate the passage

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[1] Alabama appears to be one of many States that employs the so-called "Dillon's Rule," which limits the power of local governments. *See* Adam Coester, *Dillon's Rule or Not?*, NAT'L ASS'N OF COUNTIES RESEARCH BRIEF, Jan. 2004, available at http://www.celdf.org/downloads/Home%20Rule%20State%20or%20Dillons%20Rule%20State.pdf (last visited Apr. 17, 2014). The plaintiffs misleadingly and unfairly imply that a district court has found that Alabama is currently using this system for racist reasons and to a racist end. *See* J.S. 5 ("Since adoption of the 1875 'Redeemer' Alabama Constitution, the state has denied home rule to its counties in order to 'guarantee[] the maintenance of white supremacy in majority-black counties.'" (quoting *Knight v. Alabama*, 458 F. Supp. 2d 1273, 1284-85 (N.D. Ala. 2004)). What that court held was that as an *original* matter, the "general hostility to home rule" in the 1875 and 1901 state constitutions was "motivated at least in part by race." *Knight*, 458 F. Supp. 2d at 1284. The plaintiffs presumably do not believe that state leaders' *current* use of local delegations still has either a racist purpose or effect, as they have disclaimed any intent to challenge the local delegations and indeed repeatedly argued below that local delegations should remain in place. *See* J.S. App. 33-34; *cf. Knight*, 458 F. Supp. 2d at 1312-13 (concluding that the once-discriminatory tax provisions challenged in that case "do not continue to have a segregative effect").

of this legislation," *id.* at 281, the final power to promulgate these laws lies with the Legislature as a whole. Legislators are thus "free to oppose local legislation on the floor," and any member of the House can contest local legislation in a way that requires extraordinary steps before the bill gets a vote. *Id.* at 281-82. As the district court found, "[l]ocal delegations exercise no general regulatory powers over counties; that is, local delegations cannot impose taxes; administer schools; or provide emergency services, housing, transportation, utilities, roads, sanitation services, health services, or welfare." *Id.* at 330. "And local delegations cannot enact laws for the counties." *Id.* To the contrary, no local legislation is "enacted until it receives a majority vote in both houses of the Alabama Legislature and is signed by the Governor." *Id.* at 282.

ARGUMENT

I. The Court should summarily affirm on the county-splitting claim.

The Court should summarily affirm the county-splitting claim on any of the three independent grounds offered by the district court.

A. The county-splitting claim is not ripe.

The district court properly held that the county-splitting claim is not ripe. J.S. App. 116, 297-303. This case involves no lower-court split or novel question about what standard governs the ripeness in-

quiry. Everyone agrees that "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" J.S. App. 299 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). The ripeness question here involves the district court's fact-bound and correct application of this principle to the particular facts in this record. It is particularly suited for summary affirmance.

As the district court explained, the plaintiffs' claim rests upon contingent events that may not occur as anticipated, or at all. The plaintiffs assert "that the redistricting Acts violate the Equal Protection Clause because of the way in which they interact with" a "system of local delegations" that "has not been adopted for the Legislature that would be elected in [November] 2014 in accordance with the new district maps." J.S. App. 299. As the district court found, "only the newly elected Legislature will be able to adopt that system." *Id.* at 299-300. "Because we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured, the claim under the Equal Protection Clause in count three rests on contingent future events and is not sufficiently concrete and definite to be fit for judicial review." *Id.* at 300.

The district court majority convincingly explained why the dissent, insofar as it reached a contrary conclusion, had misunderstood the facts. The plaintiffs had asserted that "the local delegation system has existed continuously from time immemorial," *id.*, and the dissenting judge agreed, *see id.* at 351-53. But the majority rightly found that "the undisputed rec-

ord evidence forecloses that argument." *Id.* at 300. "[S]worn testimony from the clerks of both houses of the Alabama Legislature" had shown that the rules "governing local legislative delegations . . . are adopted each quadrennium at the organizational session" and "apply only to the sitting Legislature." *Id.* at 300-301. "The next legislature," the majority noted, "will establish its own rules and committees in January 2015." *Id.* at 301. The district court noted that the plaintiffs had "submitted no evidence to contradict" the testimony the State submitted on these issues. *Id.* Moreover, undisputed evidence shows that the Legislature had, in previous organizational sessions, changed longstanding procedural rules. *See* J.S. App. at 291-92, 307-08.

The plaintiffs adopt the dissenting judge's argument that the claim is ripe because it is "sufficiently likely" that the 2015 Legislature will enact a local-delegation system like the current one. *Id.* at 350. See J.S. 32-24. But, as the majority explained, that sort of speculation does not allow plaintiffs to challenge legislative action that may never "occur at all." *Id.* at 302-03. If the rule were otherwise, then a plaintiff could challenge a law as unconstitutional *before* Congress actually passes it—on the theory that it was "sufficiently likely," as a political matter, that the law was going to be enacted. Just as challengers in the usual case have to wait until Congress actually goes through the political process and enacts a statute, the same is true of the plaintiffs here.[2]

---

[2] The district court also persuasively rejected the dissent's argument that the Legislature was substantially likely to continue with current practices, and that the plaintiffs' claim was ripe, based on the dissenting judge's "own theory that it would

The majority also was right to say that the plaintiffs will suffer no hardship from having to wait for the new Legislature to decide how it wants to deal with local delegations. As the majority noted, "the use of the new districts" during the election "will not, by itself, cause any harm to the" plaintiffs. J.S. App. 300. Instead, the harm they are complaining about "is dependent upon the future decision of the Alabama Legislature to adopt a system of local delegations." *Id.* And the plaintiffs could address that purported harm in two ways at that time. First, they could try to persuade the new Legislature to adopt a local-delegation system that eliminates the plaintiffs' equal-protection concerns. *Cf.* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 188 n.461 (1992) (noting that legislatures could adopt a weighted voting system that limits local delegates' power to the percentage of their constituents who reside in the county at issue). Second, if the plaintiffs cannot persuade the Legislature to choose an acceptable system, then they can file a lawsuit, if they can satisfy the requirements for

---

be potentially illegal under the Voting Rights Act for the Alabama Legislature to not adopt a system of local delegation." J.S. App. 307. As the majority noted, this "speculation about the legality of the decision of a future Alabama Legislature not to adopt a system of local delegations" is "unwarranted" because "no federal court has ever considered – let alone decided – that issue." *Id.* The majority also took note of evidence showing that previous Legislatures, without consequence under the Voting Rights Act, had "altered longstanding rules in response to political changes in memberships." *Id.* The plaintiffs have wisely chosen not to assert the dissent's argument on this point. *See* J.S. 30-39.

justiciability, seeking to enjoin whatever system the Legislature does choose. This is what plaintiffs in similar cases have done. *See DeJulio v. Georgia*, 290 F.3d 1291, 1294 (11th Cir. 2002); *Vander Linden v. Hodges*, 193 F.3d 268, 272 (4th Cir. 1999); *McMillan v. Love*, 842 A.2d 790, 793 (Md. 2004).

Either way, the district court correctly held that there is no ripe controversy now.

B. The plaintiffs lack standing.

The district court's alternative holding on standing is also suited for summary adjudication. As is true of ripeness, the standing question involves no lower-court split or novel issue about the appropriate legal standard. It is well established that "[t]o have standing under Article III, a plaintiff must establish three elements":

> (1) that the plaintiff suffered "'an injury in fact'";
> (2) that the injury was caused by the "'challenged action of the defendant'"; and
> (3) that it is "'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"

J.S. App. 304 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The district court correctly held that the plaintiffs could not establish the first two of these elements for all the same reasons they could not establish ripeness. *See id.* at 303-10. And critically for present purposes, the court also held, for independent reasons, that the plaintiffs

could not satisfy the third and essential requirement of redressability, either. *See id.* at 310-13.

As the district court explained, the plaintiffs' requested injunction would not redress any arguable one-person, one-vote problem in this case. The plaintiffs' requested relief is an injunction against the current acts' enforcement. *See* Doc. 60 at 56. But the district court observed that "no party has contended that it would be possible to create a [new] plan that is equitably apportioned at both the statewide and local delegation levels." J.S. App. 311. The plaintiffs' "proposed plans" did not "satisfy that requirement." *Id.* Nor did the plans the State implemented over the previous decade. *See id.* Accordingly, "an injunction to prevent the use of the redistricting Acts would not remedy" the equal-protection problem the plaintiffs claimed arose from the current redistricting maps. *Id.* at 310.

It bears emphasis that this redressability problem arises from limitations that the plaintiffs themselves intentionally placed on their request for relief. People who have brought similar cases in the past have sought redressable relief by actually challenging local-delegation practices. *See DeJulio*, 290 F.3d at 1294; *Vander Linden*, 193 F.3d at 272; *McMillan*, 842 A.2d at 793. But here, the plaintiffs "repeatedly asked [the court] not to enjoin the use of local delegations." J.S. App. 311. Future plaintiffs who wish to assert a redressable one-person, one-vote challenge might seek an injunction against local-delegation practices. The present plaintiffs affirmatively waived any such claim.

The dissent's response on this point had no grounding in the law. The dissent argued that the

plaintiffs' claim was redressable because "a redistricting remedy by itself could remedy the one-person, one-vote violation in at least *some* Local Delegations." J.S. App. 363 (emphasis added). As the majority countered, that argument makes no sense. "[A] failure to comply with the requirement of one person, one vote is not the sort of injury that can be redressed by *partial* compliance." *Id.* at 312 (emphasis added). "[A] governmental body is either elected in accordance with the requirement of one person, one vote, or it is not." *Id.* The majority noted, without rebuttal from either the dissent or the plaintiffs, that "[n]o court has held that partial compliance can be sufficient to redress an injury caused by inequitable apportionment." *Id.* The plaintiffs have not even tried to defend the dissent's contrary reasoning in this Court. *See* J.S. 30-34.

The plaintiffs are instead advancing an unprecedented theory that the dissent prudently declined to adopt. The plaintiffs premise their claim on the theory that although they believe the one-person, one-vote rule generally applies to local delegations, a Legislature should be allowed to violate the rule as to a particular delegation if doing so is "necessary" to satisfy the rule as to a particular district. J.S. 37-38. All three of the judges below recognized two fundamental problems with that argument. First, as the dissent noted and the majority agreed, the plaintiffs pointed to nothing "in the law, constitutional or statutory, that says that achieving one-person, one-vote for Local Delegations should be subordinated to achieving one-person, one-vote for both houses of the Legislature or vice versa." J.S. App. 404; *accord id.* at 315-16 (majority opinion). Second and just as im-

portant, both the majority and dissent agreed that the plaintiffs had failed "to define the word 'necessary'" for these purposes "or provide any other standard with which [the court] could adjudicate this claim." *Id.* at 315; *accord id.* at 404 (dissenting opinion). Even in their papers to this Court, the plaintiffs have refused to meet that obligation. *See* J.S. 34-39.

These standing problems thus arise from case-specific procedural moves the plaintiffs have made. Future plaintiffs may be able to avoid these problems by taking a different approach. In this case, summary affirmance on the standing ground is the correct disposition.

C. The plaintiffs' claim fails on the merits.

The district court's alternative holding on the merits is yet another independent reason to summarily affirm. As with the ripeness and standing questions, this issue concerns only the application of an established legal standard to the facts at hand. The applicable rule, set forth by *Hadley v. Junior College District*, 397 U.S. 50 (1970), requires "'each qualified voter'" to "'be given an equal opportunity to participate'" when a government selects persons "'by popular election'" who are to "'perform governmental functions.'" J.S. App. 320 (quoting *Hadley*, 397 U.S. at 56). If this Court does not affirm on jurisdictional grounds, the district court's fact-bound application of the *Hadley* rule will be worthy of summary affirmance for at least two reasons.

1. The district court's merits ruling was correct and consistent with the decisions of other courts.

As an initial matter, the district court's application of *Hadley*'s "governmental functions" requirement was correct. The court determined that even if it could assume that the 2015 Legislature will use a local-delegation system like the current one, the plaintiffs had not shown that those delegations exercise "governmental functions." J.S. App. 314-39. The plaintiffs' principal argument before the district court on this issue was the same one it is making here—namely, that the delegations exercise governmental functions because they engage in "[l]awmaking." J.S. 35. The district court explained why the plaintiffs' argument is factually and legally wrong.

As a factual matter, the district court observed, "the legislature, not the local delegations, is engaged in the governmental function of lawmaking." J.S. App. 321 (citing *DeJulio*, 290 F.3d at 1296). The local delegations' approval of proposed legislation does not give it the force of law. Instead, "local legislation, like all other legislation, is not officially enacted until it is approved by majorities of both houses and signed by the Governor or approved by majorities of both houses over the veto of the Governor." *Id.* at 323. Although non-local representatives often defer to the delegations as a matter of courtesy, the record contains uncontested evidence "about Alabama legislators who disregarded local courtesy to prevent the

enactment of certain pieces of local legislation." *Id.* at 324. Accordingly, the "'gatekeeping'" function performed by these delegations is no different from the function performed by "other legislative committees" such as finance or ways and means. *Id.* at 336. If the one-person, one-vote requirement applies to legislative delegations because they perform this function, then it must apply to all legislative committees. As the district court observed, that cannot be the law. *Id.* (citing *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1298 (N.D. Ga. 2001), *affirmed*, *DeJulio*, 290 F.3d at 1297).

In light of that logic, it should come as no surprise that the plaintiffs have not cited a single lower-court decision supporting their view on the governmental-functions point. To the contrary, other courts appear to have uniformly concluded that gatekeeping functions do not implicate one-person, one-vote. *See DeJulio*, 290 F.3d at 1295-97 (local delegation); *Driskell v. Edwards*, 413 F. Supp. 974, 976-78 (W.D. La.) (constitutional convention), *aff'd mem.*, 425 U.S. 956 (1976); *McMillan*, 842 A.2d at 800-01 (local delegation); *Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783, 788-90 (Iowa 1994) (advisory commission). The dissent below had no choice but to argue that *each* of these decisions, including one this Court summarily affirmed, was "erroneous." J.S. App. 403-06. In what appears to be the only precedent finding a one-person, one-vote problem with a local delegation, South Carolina "conceded" that its particular delegations "perform[ed] numerous and various general county governmental functions." *Vander Linden*, 193 F.3d at 275. Those included "fiscal and regulatory powers"

that far exceed the gatekeeping functions to which the plaintiffs pointed the district court in this case. *Id.* The district court's application of *Hadley* was consistent with this body of law.

2. The district court's merits adjudication was supported by multiple additional grounds.

The holes in the plaintiffs' case on the merits are not confined to the governmental-functions issue. At least three additional problems stand firmly in the way of the plaintiffs' ultimate success here.

First, the majority and dissenting judges agreed that the plaintiffs also "failed to identify the constitutional standard that [the court] should" ultimately employ to adjudicate their equal-protection claim. J.S. App. at 315; *see also id.* at 403-04 (agreeing with the majority that "the plaintiffs fail to define 'necessary'"). The plaintiffs believe that the one-person, one-vote rule applies to local delegations unless deviation is necessary to comply with that rule for the legislature as a whole. But the plaintiffs failed "to define" when it would be "necessary" to deviate from the rule "or provide any other standard with which [the court] could adjudicate this claim." *Id.* at 315; *accord id.* at 404 (dissenting opinion). When a court "ha[s] no standard by which to measure the burden [the plaintiffs] claim has been imposed on their representational rights, [the plaintiffs] cannot establish that the alleged political classifications burden those same rights." *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring in the judgment).

Second, the local delegations do not trigger the one-person, one-vote rule for a separate reason under *Hadley*: they are not selected "by popular election." *Hadley*, 397 U.S. at 56. The plaintiffs are mistaken when they assert that delegation members become members "'*as a matter of law* upon their various elections.'" J.S. 36 (emphasis added) (quoting *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989)). Instead, the district court found that members of local delegations "are selected through a process that occurs *after* the election of the legislators." J.S. App. 337 (emphasis added). "[T]he legislative committees and local delegations are all appointed in the same organizational session that occurs each quadrennium." *Id.* Because "[u]ntil that meeting, no such internal organization exists," the local delegations are no more "elected" by operation of law than are the members of a legislative judiciary committee. *Id.* This point also underscores the lack of ripeness: a future legislature could decide to appoint any member to any committee to function as a gatekeeper for local legislation.

Third, on a more fundamental level, the plaintiffs' one-person, one-vote theory is incoherent. As to each individual legislator, the new electoral maps ensure tight conformity with the one-person, one-vote rule. So if the 2015 Legislature adopts a local-delegation system like the current one, then within each delegation, each member will be elected by roughly the same number of people. The crux of the plaintiffs' claim is thus not really one-person, one-vote. It is that some people who live outside a particular county will get to vote for a representative who will sit on that county's delegation. *See* J.S. 36-37.

Yet the plaintiffs have not come close to showing that the Constitution prohibits that sort of arrangement. People cross county lines all the time, for all sorts of business, governmental, and personal reasons. Somebody who commutes from her home in a rural county to her business in an urban county has a considerable interest in whether the urban county can charge her an income tax. And the only precedent from this Court the plaintiffs cite on this front, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), does not hold that the Constitution precludes States from giving people who are affected by another jurisdiction's laws a say in how that jurisdiction will be governed. *See* J.S. 37 (citing *Holt Civic Club*, 439 U.S. at 68-69)). It holds only that the Constitution does not always *require* the State to take that step. And it affirmatively recognizes the "logical appeal" of occasionally extending the franchise to affected persons beyond a jurisdiction's borders. *Holt Civic Club*, 439 U.S. at 70. The very cornerstone of the plaintiffs' equal-protection claim is on exceedingly shaky ground.

II. The Court should summarily affirm the district court's rejection of the racial gerrymandering claim.

The plaintiffs briefly argue that the plans violate the Equal Protection Clause in their entirety because they purportedly categorize voters on the basis of race. J.S 39-40. Not even the dissenting district judge below endorsed that argument. *See* App. 227 ("With this dissent, I am not saying that the plaintiffs should prevail as to all the districts."). Instead,

the dissenting district judge suggested that the court should separately review the drafters' decisions with respect to each individual district—a claim that the plaintiffs never made below and have not suggested now on appeal.[3] *Id.*

Despite their cursory arguments, the plaintiffs' jurisdictional statement does not sufficiently present their racial gerrymandering claim on appeal. First, in light of the district court's unchallenged fact-findings, the plaintiffs' argument on appeal that the State lacks a compelling interest to "classify voters by race" is beside the point. J.S. 39-40. The district court held a four-day bench trial and expressly found as a matter of fact that race was *not* the predominant reason for adopting these plans and that the plans do *not* classify voters on the basis of race. The plaintiffs have not argued that these fact-findings are clearly erroneous. *See Easley v. Cromartie*, 532 U.S. 234 (2001) (reviewing such rulings for clear error). The State must identify a compelling interest only if race is the "*predominant* factor motivating the legislature's redistricting decision." *Bush v. Vera*, 517 U.S. 952, 959 (1996). Because the plaintiffs have not attacked as clearly erroneous the district court's finding that race was *not* the "predominant factor," they have effectively forfeited their racial gerrymandering claim.

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[3] *Compare* dissenting opinion, J.S. App. 238 ("the court must scrutinize each and every individual district to see whether race was the predominant factor") *with* plaintiffs' brief, J.S at 39 ("It is unnecessary to scrutinize district shapes and census statistics to see that Alabama's 2012 House and Senate plans classify voters by race.").

Second, even if the plaintiffs had shown the district court's fact-findings to be clearly erroneous, their claim would fail. The plaintiffs are challenging the drafters' decision to comply with Section Five of the Voting Rights Act by keeping the majority-black districts under the new plan roughly the same as the ones under the old plan. *See* J.S. 39-40. They argue that compliance with Section Five is not a "compelling interest" because, after these plans were enacted and pre-cleared, this Court held that Alabama does not have to secure preclearance of voting changes going forward. *Id.* at 40. But the Legislature obviously has a compelling interest in complying with federal law as it exists when the Legislature acts. And, more fundamentally, the plaintiffs cannot seriously contend that African-American voters in Alabama would be better off if the Legislature had ignored the U.S. Department of Justice and intentionally violated Section Five.

The plaintiffs' state-wide racial gerrymandering claim also fails for several additional reasons. These reasons are addressed in the defendants' motion to affirm in Appeal No. 13-1138.

CONCLUSION

The Court should summarily affirm the judgment of the district court.

Respectfully submitted,

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April 21, 2014

REPLY BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY - 2 2014
OFFICE OF THE CLERK

No. 13-895

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS *et al.*,

Appellants,

v.

THE STATE OF ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF ALABAMA LEGISLATIVE BLACK CAUCUS *ET AL.* REPLYING TO THE JOINT MOTION TO DISMISS OR AFFIRM

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The following are the appellees:

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Intervenor-defendants:
Gerald Dial, Alabama Senator
Jim McClendon, Alabama Representative

The following are the appellants in Docket No. 13-1158:

The Alabama Democratic Conference
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Stacey Stallworth
Rosa Toussaint
Lyne Pettway
Estate of Rep. Demetrius Newton

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BRIEF OF ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. REPLYING TO THE JOINT MOTION TO DISMISS OR AFFIRM

This appeal requires the Court to decide what direction the constitutional jurisprudence of state legislative redistricting will take in the twenty-first century. Appellee State of Alabama contends that, so long as it adopts *de minimis* population deviation standards, the partisan legislative majority can ignore county boundaries and draw House and Senate districts that "further the interests of incumbents." Appellees' Joint Motion To Dismiss or Affirm the appeal of the Alabama Legislative Black Caucus *et al.* ("MDA") at 6. Redistricting, the State appellees say, has been reduced to "the stuff of routine legislative compromise." Id. at 7.

The Court should redirect the State of Alabama to constitutional first principles, which guarantee the rights of voters to fair and equal representation, not the prerogatives of legislators. *Reynolds v. Sims*, 377 U.S. 533 (1964). This case demonstrates how unrestrained gerrymandering practices are spiraling out of control. There is no way to exclude partisan and racial considerations entirely from legislative redistricting. Forcing state House and Senate districts back inside county boundaries, consistent with substantial population equality, can significantly restrain both partisan and racial gerrymandering and make legislators more responsive to their local constituents.

I. The Equal Protection Claim On Behalf of County Residents Is a Threshold Issue Warranting Summary Reversal.

A decision by this Court upholding the Fourteenth Amendment right of Alabama's county residents to House and Senate districts that do not split their county boundaries except when necessary to produce substantial population equality among districts statewide would render moot all remaining issues in this appeal and in Appeal No. 13-1138. The Legislature would be required to redraw completely the 2012 plans that split 50 of Alabama's 67 counties in the House and 33 counties in the Senate. Because of *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), the new redistricting plans would not be subject to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and there would be no need for this Court to decide whether Section 5 justified the 2012 Legislature's attempt to preserve with 2010 census data the racial percentages in every majority-black district. And all of the claims advanced by the Alabama Democratic Conference appellants, which challenge specific districting choices in the 2012 plans, would be moot.

A. The ALBC Appellants Have Diligently Pursued a Timely Resolution of Their Whole-County Claim.

The State appellees misplace the equities of timeliness calling for summary action in this appeal, with primary elections scheduled for June 3 and the general election to be held November 4, 2014. Appellees' Joint Motion To Dismiss or Affirm the appeal of the Alabama Democratic Conference *et al.* ("MDA No. 13-1138") at 1-2. It was the

State who succeeded in getting this Court to dismiss for want of jurisdiction the ALBC parties' interlocutory appeal from the same August 2, 2013, divided decision of the district court rejecting the one-person, one-vote claim of county residents that now is back before the Court. *Alabama Legislative Black Caucus v. Alabama*, 134 S.Ct. 694 (2013). The ALBC appellants filed their jurisdictional statement appealing the December 20, 2013, final judgment of the district court on January 23, 2014. The State appellees requested and received not one but two extensions of time for filing their response to the ALBC jurisdictional statement. See Clerk's letters to Brasher dated February 4, 2014, and March 24, 2014.

It may be too late now for summary reversal of the whole-county judgment to allow time for drawing new plans before the June 3 primary. But there is still time for the Legislature – or the district court – to adopt new plans restoring county boundaries before the November 4 general election. If not, the district court could follow the precedent it set when it ordered mid-term elections in 1983 after the Legislature finally adopted House and Senate redistricting plans that satisfied all federal and state requirements. *Burton v. Hobbie*, 561 F.Supp. 1029 (M.D. Ala. 1983) (three judge court).

B. The Equal Protection Claim of County Residents Is Ripe for Adjudication, and Appellants Have Standing To Assert It.

The State appellees defend the ruling, which the district court majority raised *sua sponte*, that the whole-county claim is not ripe and appellants lack Article III standing, based on speculation that in 2015 the Alabama

House and Senate may abandon their century-old informal customs of local courtesy. MDA at 11-17. This stands the principles of ripeness and standing on their heads. There is no evidence that anyone in or out of the Legislature wants to end the local courtesy custom and county delegations' informal, exclusive power to control the introduction and passage of local laws concerning their counties. The district court majority relied entirely on its own invitation for the Legislature to consider disrupting one of its most cherished practices to hold that the 2012 redistricting plans cannot be challenged in light of today's circumstances and must await developments that are highly unlikely tomorrow.

The State appellees defend the majority's reliance on the testimony of the House and Senate clerks. MDA at 12-13. But like the district court majority they ignore the relevant part of the clerks' declarations. Both clerks emphasized that "[n]othing in the Rules of the Alabama House [or Senate] requires members to observe local courtesy, so, to the extent it is observed, that is done as a matter of custom." Affidavits of Jeff Woodard and Patrick Harris, Doc. 132-1 at 32, Doc. 132-2 at 30. No committee or rule of the Legislature can instruct its members how to vote, see Ala. Const., Art. IV, §§ 55 and 56, and there is no way for the leadership to adopt formal rules that end the local courtesy custom.

This case is not like *Texas v. United States*, 523 U.S. 296 (1998), where it was presently unknown whether any school district was subject to being sanctioned under yet to be defined state achievement rules. A more relevant precedent is *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), where clean air

regulations made it presently known what action states had to take to comply. The Court rejected the argument that the question of statutory interpretation was not ripe because it was unknown if the EPA might modify its rules in the future. In the instant appeal it is known both how the local courtesy customs operate presently and how the 2012 House and Senate districts will determine which voters can elect in 2014 the members of each county legislative delegation. Ripeness cannot be undermined by the tautology that it is unknown whether in the future what is known in the present may change.

The State appellees also defend the holding of the majority below that appellants lack standing to assert an equal protection claim for county voters because it fails on the constitutional merits. MDA at 16. That basis for denying standing falls with the majority's erroneous decision on the merits.

C. The County Integrity Claim Is Grounded in First Principles of One-Person, One-Vote Law.

Appellants' jurisdictional statement clearly states that their equal protection claim for county residents raises a question of first impression. ALBC J.S. at 30. But the State appellees are not entirely correct when they argue not a single precedent supports our contention that county legislative delegations are exercising the kind of governmental functions that invoke the constitutional rule of one person, one vote. Constitutionally significant principles of fair representation were implicit in *Reynolds*' acknowledgment of the importance of county delegations in Alabama.

> A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions as political subdivisions. Several factors make *more than insubstantial* claims that a State can rationally consider according political subdivisions *some independent representation* in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. . . . In many States *much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.* And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.

377 U.S. at 580-81 (emphases added). This is a clear reference to the important governmental function of "independent representation" county delegations exercise. So is the Court's warning about "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, [which] may . . . itself furnish a ready tool for ignoring factors that in day-to-day operation are *important to an acceptable representation* and apportionment arrangement." *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)) (emphasis added).[1]

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1. At least one election law treatise notes the prevalence of local legislative delegation customs, "especially in the South,"

More recently, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court did not examine the representational policy underlying the whole-county provision in the North Carolina Constitution that protected Pender County from being split among House districts unless failing to do so would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. But there is little doubt North Carolina's state constitutional policy implicates the same equal protection rights that the one-person, one-vote rule addresses. Alabama's constitution has similar provisions that prohibit splitting counties between either House or Senate districts. Ala. Const. Art. IX, §§ 198-200. In this Court and in the district court on remand from *Reynolds*, Alabama argued these state constitutional requirements prevented compliance with a federal constitutional requirement of one person, one vote. *Reynolds*, 377 U.S. at 584; *Sims v. Baggett*, 247 F.Supp. 96, 103 (M.D. Ala. 1965) (three judge court). Remarkably, in the instant appeal, the State of Alabama makes no mention of the Alabama constitution. Adopting an ironic stance of reverse federalism, in the court below the State successfully argued this Court's one-person, one-vote jurisprudence has liberated the Alabama Legislature from the redistricting constraints in its own constitution. The district court agreed and held it was barred from considering how the Legislature's arbitrary decision to restrict allowable population deviations to a *de minimis* ± 1% aggravated widespread violations of the whole-county state constitutional provisions. Memorandum Opinion and Order, Dec. 26, 2012, J.S. App. at 439-46.

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and suggests county residents could "challenge the make-up of the county's delegation" on one-person, one-vote grounds. D. Lowenstein, R. Hasen, and D. Tokaji (eds.), ELECTION LAW: CASES AND MATERIALS, Fifth Edition (Carolina Academic Press, 2012) (Kindle Location 2972).

The State appellees say the Legislature was justified in prohibiting larger deviations because it "eliminated the partisan gerrymander that existed in the former districts." MDA at 4 (quoting J.S. App. 146). But the degree of meaningful gerrymandering that can be accomplished by such small variances in population pales in comparison with the gerrymandering *Reynolds* warned could result from ignoring county boundaries. The 2012 drafters' disregard of county boundaries allowed Republican incumbents to wander across neighboring counties searching out voters they expect to support their re-elections. It is the voters who must pay the price.

The State appellees wrongly argue no court has articulated a manageable judicial standard for enforcing county residents' equal voting rights, and "the requirement of one person, one vote is not the sort of injury that can be redressed by partial compliance." MDA at 17 (quoting J.S. App. 312). This is a direct assault on the direction in *Reynolds* that the one-person, one-vote principle not be allowed to permit "[i]ndiscriminate districting, without any regard for political subdivisions," which should be respected subject to "the overriding objective [of] substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579.

The district court's demand for a bright-line standard and its criticism of plaintiffs for failing "to define the word 'necessary,'" MDA 18 (quoting J.S. App. 315) are directed at the entire body of this Court's one-person, one-vote jurisprudence. See cases cited in ALBC Jurisdictional Statement at 37-38. The district court majority's

claim of unmanageability squarely conflicts with the same court's decision after the Legislature's post-1980 census redistricting, which found the Legislature's plan "impermissible under Ala. Const. art. IX, §§ 198, 199 & 200 because of its disregard for the integrity of county lines. Boundaries of thirty counties were unnecessarily split by the plan." *Burton v. Hobbie*, 561 F.Supp. at 1035.

The State appellees seize on the district court majority's misapplication of *DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir.2002), cert. denied, 537 U.S. 948 (2002), to contend the leadership of the Legislature may turn control over local laws to legislators who represent none of the affected county residents. MDA at 22 ("a future legislature could decide to appoint any member to any committee to function as a gatekeeper for local legislation"). This is an alarming contention, which, if implemented, would completely undermine county voters' control over their local laws, adding yet another chapter to Alabama's continuing history of manipulating the structure of state and local government to prevent local black majorities from being able to govern themselves. The State appellees wrongly discount the dissent's concern that ending the customs empowering local delegations could violate the Voting Rights Act. MDA at 13-14 n.2. See *Schuette v. Coalition To Defend Affirmative Action*, __ S.Ct. __, 2014 WL 1577512 (April 22, 2014) (the Fourteenth Amendment prohibits modifying the political process to disadvantage targeted minorities).

Appellees completely misconceive the significance of *Knight v. Alabama*, 458 F. Supp. 2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir.), *cert. denied*, 127 S.Ct. 3014 (2007). MDA at 10 n.1. The *Knight* court found that

restrictions were placed in the Alabama Constitution to prevent county officials from raising taxes on land owned by whites to pay for the education of black children. 458 F.Supp.2d at 1295-97. The *Knight* court denied relief because it concluded property tax discrimination was beyond the purview of the higher education desegregation issues before it. A new lawsuit challenging those same property tax restrictions, filed primarily for K-12 students in the majority-black counties in Alabama's Black Belt, is pending certiorari before this Court. *Lynch v. Alabama*, No. 13-1232 (U.S.) (petition filed April 10, 2014)

The most important governmental function county delegations exercise in the Alabama Legislature is control over county taxes. Amendments to the Alabama Constitution Governor George Wallace pushed through the Legislature in the 1970s require county officials to get the Legislature's approval of any increases in millage rates. *Knight*, 458 F.Supp.2d at 1286-97. Obviously, there is no governmental function more important than the power of taxation.

II. The Racial Gerrymandering Claim, Should the Court Address It, Also Warrants Summary Reversal.

Reversal of the judgment below on the one-person, one-vote claim of county residents would moot the racial gerrymander issues, as the State appellees seem to concede. MDA No. 13-1138 at 23 n.3. If the Court addresses it, the district court's ruling on the racial gerrymandering claims should be reversed summarily, because, based on the undisputed facts, the drafters' strategy for assigning racial populations to House and Senate districts, in its

very design, violated the core principles of the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases.[2]

The district court majority found "that the effort to preserve the majority-black districts and bring them into compliance with the requirement of one person, one vote drove the development of the Acts." J.S. App. 103. It acknowledged the drafters thought that to comply with the Voting Rights Act "the new districts could not reduce the total number of majority-black districts for each house and that the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census." Id. at 32-33. And it conceded the arbitrary ± 1% deviation restriction sharpened the focus on racial populations: "Because the Legislature used a tighter deviation in population compared to the Democrat-controlled Legislature in 2001, the number of black people and the percentage of the black population moved into majority-black districts were higher under the Acts than compared to those same numbers in 2001." Id. at 53.

The State appellees argue these undisputed facts do not violate *Shaw v. Reno* because the district court majority found "that the constitutional requirement of one person, one vote trumped every other districting principle." MDA at 3 (quoting J.S. App. 151). But the majority misconceived the *Shaw* standard when it held the redistricting plans were not subject to strict scrutiny

2. The State appellees wrongly argue that "the ALBC plaintiffs have effectively forfeited [the racial gerrymandering] claim," saying we "devote only two pages" of our jurisdictional statement to it. The jurisdictional statement actually devotes pages 13-18, 25-29, and 39-40 to the racial gerrymandering issues.

because the drafters had a "paramount commitment to population equality. . . ." J.S. App. 152. Population equality is "the paramount objective" in every redistricting plan, especially when Congressional districts are being redrawn. *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (quoting *Karcher v. Daggett*, 462 U.S. 725 (1983)). The relevant question is whether race was the predominant factor in determining which of the many possible arrays that satisfy population equality were selected. *Shaw* itself involved Congressional redistricting and its requirement of *de minimis* population deviations, as did *Miller v. Johnson*, 515 U.S. 900 (1995). The *Miller* Court relied on direct evidence that the Georgia Assembly attempted to draw a "max black" plan containing three majority-black Congressional districts that would satisfy the Department of Justice, id. at 907-08, a mapping objective not unlike the one presented in the instant appeal, where the Alabama drafters announced their intention to head off DOJ objections by preserving the sizes of black majorities to the extent possible. Viewing the 2012 House and Senate plans on their face, it is apparent "that the legislature subordinated traditional race-neutral districting principles, including . . . compactness . . . and respect for political subdivisions . . . to racial considerations." *Miller*, 515 U.S. at 916.

CONCLUSION

The judgment below should be reversed summarily. Alternatively, the Court should note probable jurisdiction.

Respectfully submitted,

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JOINT APPENDIX

Nos. 13-895, 13-1138

In The
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

JOINT APPENDIX

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Appeal Docketed, No. 13-1138, March 14, 2014
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APPENDIX

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Alabama Legislative Black Caucus v. Alabama, Case Nos. 2:12-CV-691 and 2:12-CV-1081 (M.D. Ala., Dec. 20, 2013) (final judgment).....App. 276

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Date Filed	No.	Docket Text
08/10/2012	1	COMPLAINT; THREE-JUDGE COURT REQUESTED against Beth Chapman, The State of Alabama (Filing fee $ 350.00 receipt number 4602023799.), filed by Albert F. Turner, Jr, Rhondel Rhone, Alabama Association of Black County Officials, George Bowman, Alabama Legislative Black Caucus, Fred Armstead, Jiles Williams, Jr, Bobby Singleton. (Attachments)
08/27/2012	7	First MOTION for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al. (Attachments)
8/27/2012	8	BRIEF/MEMORANDUM in Support of 7 Motion for Partial Summary Judgment filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr.
08/31/2012	14	MOTION to Dismiss or, in the Alternative, Motion to Stay by Beth Chapman, The State of Alabama

09/13/2012	24	DESIGNATION OF THREE-JUDGE COURT [42 U.S.C. 1973c and 28 U.S.C. 22284]
09/19/2012	25	ORDER: Before the three-judge court is a 14 Motion to Dismiss or, in the Alternative, to Stay, filed by Defendant State of Alabama and Beth Chapman in her official capacity. Upon careful consideration of the motion, response, reply, and surreply (Docs.14, 15, 20, 23), as well as the supporting and opposing authority, it is ORDERED that the motion to stay is GRANTED until further order of the three-judge court. Plaintiffs and Defendants are DIRECTED to file a joint report on or before 10/31/2012, concerning the status of the declaratory judgment action in Alabama v. Holder, No.1:12-CV-1232 (D .D C .July 26, 2012), and the preclearance submission pending before the Attorney General of the United States.
10/10/2012	27	ORDER re 26 Joint Status Report. The parties have informed the court that the Attorney General of Alabama has been notified that the Attorney General of the United States does not interpose any objection to the House and Senate redistricting plans in Alabama Acts Nos. 2012-602 and 2012-603. The parties also have informed the court that the State of Alabama has filed a notice of

		voluntary dismissal in Alabama v. Holder, No. 1:12-CV-1232 (D.DC. July 26, 2012). Based upon the joint status report and the agreement of the parties, it is ORDERED that the stay imposed on 9/19/20 12 (Doc.25) is LIFTED and that Defendants shall file an Answer to the Complaint and a Response to Plaintiffs' 7 Motion for Partial Summary Judgment and for Preliminary Injunction on or before 10/26/2012. Plaintiffs may file a reply to Defendants' response on or before 11/2/2012. It is further ORDERED that Defendants' 14 MOTION to Dismiss, filed pursuant to Rule 12(b)(1) of the FRCP, is DENIED as moot
10/26/2012	28	ANSWER to 1 Complaint,, by Beth Chapman, The State of Alabama
10/26/2012	29	MOTION for Judgment on the Pleadings by Beth Chapman, The State of Alabama
10/26/2012	30	CONSOLIDATED MEMORANDUM in Support of 29 Motion for Judgment on the Pleadings and in OPPOSITION to Plaintiff's 7 Motion for Partial Summary Judgment, and 8 Brief in Support, and for Preliminary Injunction[RESPONSE to Dockets #7 & 8 – SUPPORTING #29] filed by Beth Chapman, The State of Alabama. (Attachments)

11/02/2012	32	REPLY BRIEF Supporting 7 MOTION for Partial Summary Judgment and MOTION for Preliminary Injunction and MOTION for Permanent Injunction, filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
11/14/2012	35	RESPONSE in Opposition re 29 MOTION for Judgment on the Pleadings filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)
11/26/2012	39	REPLY to Plaintiffs' 35 Response to 29 Motion for Judgment on the Pleadings filed by Beth Chapman, The State of Alabama.
12/13/2012	1	COMPLAINT; THREE-JUDGE COURT REQUESTED against State of Alabama, Robert J. Bentley, in his official capacity as the Governor of the State of Alabama, and Beth Chapman, in her official capacity as the Alabama Secretary of State (Filing fee $ 350.00 receipt number 4602025244), filed by Demetrius Newton, Alabama Democratic Conference, Framon Weaver, Sr., Stacey

		Stallworth, Rosa Toussaint and Lynn Pettway (Attachments)
12/18/2012	12	ORDER regarding DESIGNATION OF THREE-JUDGE COURT [42 U.S.C. 1973c and 28 U.S.C. 22284]
12/19/2012	42	ORDER directing that, pursuant to Rule 42(a)(2) of the FRCP, the three judge court finds that these actions involve common questions of law and fact and that consolidation would eliminate unnecessary repetition and confusion; accordingly, it is ORDERED that civil actions 2:12-CV-691 and 2:12-CV-1081 are CONSOLIDATED before the three-judge court; further ORDERED that the lead case shall be 2:12-CV-691 and that all pleadings, motions, briefs, orders, and other documents shall be filed only in 2:12-CV-691
12/26/2012	53	MEMORANDUM OPINION AND ORDER directing that the 7 motion by the Black Caucus for partial summary judgment and for preliminary and permanent injunction as to count one of its complaint is DENIED; the 29 motion by the State defendants for judgment on the pleadings as to count one of the complaint filed by the Black Caucus is GRANTED; the 29 motion by the State defendants for judgment on the pleadings as to count two of that complaint is DENIED; count three of

		that complaint is DISMISSED WITHOUT PREJUDICE; We GRANT the Black Caucus leave to amend its complaint within 21 days from the date of this order; the 29 motion by the State defendants for judgment on the pleadings as to count three of that complaint is DENIED AS MOOT; as further set out.
01/09/2013	59	ANSWER to Complaint [ANSWER TO COMPLAINT OF NEWTON PLAINTIFFS] by Robert J. Bentley, Beth Chapman, The State of Alabama
01/15/2013	60	AMENDED COMPLAINT against All Defendants, filed by Albert F. Turner, Jr, Rhondel Rhone, Alabama Association of Black County Officials, George Bowman, Alabama Legislative Black Caucus, Fred Armstead, Jiles Williams, Jr, Bobby Singleton. (Attachments)
01/25/2013	61	ANSWER to 60 Amended Complaint, by Beth Chapman, The State of Alabama
01/25/2013	62	MOTION to Certify Class ["Motion for Class Certification Scheduling Conference" by Beth Chapman, The State of Alabama
01/29/2013	63	ORDER LIFTING STAY AND DIRECTING PARTIES TO HOLE [sic] A RULE 26(f) CONFERENCE
02/06/2013	66	Second MOTION for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead,

		George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)
02/06/2013	67	BRIEF/MEMORANDUM in Support re 66 Second MOTION for Partial Summary Judgment filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
02/28/2013	76	RESPONSE in Opposition re 66 Second MOTION for Partial Summary Judgment filed by Beth Chapman, The State of Alabama. (Attachments)
03/04/2013	77	REPLY BRIEF re 66 Second MOTION for Partial Summary Judgment filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
03/13/2013	82	MOTION to Intervene by Gerald Dial, Jim McClendon.(Attachments)
03/25/2013	88	BRIEF/MEMORANDUM in Support supplemental authorities filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)

03/27/2013	90	ORDER granting 82 Motion to Intervene; Senator Dial and Representative McClendon are permitted to intervene as defendants
03/27/2013	91	Intervenors' ANSWER to 60 Amended Complaint, by Gerald Dial, Jim McClendon
03/27/2013	20	Intervenors' ANSWER to 1 [Newton] Complaint, by Gerald Dial, Jim McClendon
03/27/2013	93	MOTION to Alter or Amend 89 Order Denying Plaintiffs' 66 Second Motion for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al.
03/28/2013	94	ORDER GRANTING MOTION FOR CLASS CERTIFICATION: ORDERED that the ALBC Plfs' 69 Motion for Certification of a Class Action is GRANTED and the following subclasses are CERTIFIED pursuant to Rule 23(a) and (b)(2), as further set out in order; further ORDERED that attorneys James Uriah Blacksher, Esq., U.W. Clemon, Esq., and Wilson Edward Still, Esq., are DESIGNATED as class counsel; further ORDERED that the named Plfs in the ALBC action the Alabama Legislative Black Caucus, Bobby Singleton, Alabama Association of Black County Officials, Fred

Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr. are DESIGNATED as representatives of the Rule 23(b)(2) subclasses; further ORDERED that the Newton Plfs may appear, participate, and present claims individually in this consolidated litigation, as further set out in order

04/03/2013 95 MOTION for Partial Summary Judgment [MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE ALBC PLAINTIFFS RESTATED PARTISAN GERRYMANDERING CLAIM] by Beth Chapman, The State of Alabama

04/03/2013 96 BRIEF/MEMORANDUM in Support re 95 MOTION for Partial Summary Judgment [MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE ALBC PLAINTIFFS RESTATED PARTISAN GERRYMANDERING CLAIM] filed by Beth Chapman, The State of Alabama. (Attachments)

04/04/2013 97 MOTION to Amend/Correct 96 BRIEF/MEMORANDUM in Support, by Beth Chapman, The State of Alabama.

04/04/2013 98 AMENDED Memorandum in Support of 95 Motion for Partial Summary Judgment, filed by Beth Chapman, The State of Alabama. Amending 96 Memorandum in Support. (Attachments)

04/05/2013 101 MEMORANDUM OPINION AND ORDER: We DENY the 93 Motion to alter or amend our judgment. We sua sponte VACATE our initial 89 order denying the 66 second motion for partial summary judgment and SUBSTITUTE this memorandum opinion and order. We DENY the 66 second motion for a partial summary judgment for the reasons stated in the opinion and order

04/05/2013 102 THOMPSON, District Judge, concurring with 101 Memorandum Opinion and Order

04/17/2013 106 RESPONSE in Opposition re 95 MOTION for Partial Summary Judgment [MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE ALBC PLAINTIFFS RESTATED PARTISAN GERRYMANDERING CLAIM] and brief supporting ALBC plaintiffs' motion to reconsider denial of their second motion for partial summary judgment and motion for entry of a permanent injunction filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.

04/17/2013 107 MOTION for Reconsideration of denial of plaintiffs' second motion for

		partial summary judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al.
04/17/2013	108	MOTION for Permanent Injunction by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al.
04/24/2013	109	REPLY to ALBC Plaintiffs' 106 Response to ALBC State Defendants' 95 Motion for Partial Summary Judgment and Response in Opposition to ALBC Plaintiffs' 107 MOTION for Reconsideration and 108 MOTION for Permanent Injunction filed by Beth Chapman, The State of Alabama.
05/06/2013	111	REPLY to Defendants' 109 Response to Plaintiffs' 107 MOTION for Reconsideration of denial of plaintiffs' second motion for partial summary judgment, and 108 MOTION for Permanent Injunction filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
06/17 2013	121	MOTION for Summary Judgment with Respect to Remaining Claim of the ALBC Plaintiffs of Race-Based Vote Dilution and Isolation by Beth Chapman, The State of Alabama

06/17/2013 123 MOTION for Summary Judgment with Respect to Newton Plaintiffs' Claims by Beth Chapman, The State of Alabama

06/17/2013 124 BRIEF/MEMORANDUM in Support re 123 MOTION for Summary Judgment filed by Robert J. Bentley, Beth Chapman, The State of Alabama. (Attachments)

06/17/2013 125 BRIEF/MEMORANDUM in Support re 121 MOTION for Summary Judgment filed by Beth Chapman, The State of Alabama. (Attachments)

06/28/2013 130 ORDER: We ORDER the parties to file simultaneous supplemental letter briefs by Tuesday, July 9, 2013, to address whether this claim under the Equal Protection Clause is ripe for review and whether the Black Caucus plaintiffs have standing to bring it. We invite both parties to submit any material evidence along with their letter briefs to help us resolve these questions.

07/01/2013 131 THOMPSON, District Judge, concurring, as further set out.

07/09/2013 132 REPLY BRIEF (Joint) filed by Beth Chapman, Gerald Dial, Jim McClendon, The State of Alabama pursuant to this Court's 130 Order and the concurring opinion of Judge Thompson of 7/1/2013 (No. 131). (Attachments)

07/09/2013 133 SUPPLEMENTAL BRIEF responding to 130 Order, 131 Order requesting supplemental briefs on ripeness and standing filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr.

07/10/2013 134 RESPONSE in Opposition re 121 MOTION for Summary Judgment re racial discrimination claims filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)

07/10/2013 135 RESPONSE to Motion for Summary Judgment by Demetrius Newton, et al.

07/10/2013 136 BRIEF in support of RESPONSE to Motion for Summary Judgment by Demetrius Newton, et al.

07/10/2013 137 Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)

07/10/2013 138 Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn

		Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	139	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	140	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	141	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	142	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support Corrected Exhibit EE filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/16/2013	153	ORDER ON PRETRIAL HEARING

07/17/2013 154 REPLY BRIEF (Consolidated) to the 134 Response to the 121 Motion for Summary Judgement, filed by Beth Chapman, Gerald Dial, Jim McClendon, and The State of Alabama. (Attachments)

07/17/2013 155 REPLY BRIEF (Consolidated) re 135 Response to 123 Motion for Summary Judgement, filed by Robert J. Bentley, Beth Chapman, Gerald Dial, Jim McClendon, The State of Alabama. (Attachments)

07/22/2013 161 SECOND SUBMISSION of Supplemental Authorities in Support of Second Motion for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr.

07/30/2013 165 ORDER ON PENDING MOTIONS re 95 Motion for Partial Summary Judgment; 107 Motion for Reconsideration; 108 Motion for Permanent Injunction; 121 Motion for Summary Judgment; and 123 Motion for Summary Judgment. For the reasons the court will explain in an opinion to follow, it is ORDERED that the ALBC Defendants motion for a partial summary judgment against the claim of partisan gerrymandering in count three of the ALBC Plaintiffs

amended complaint is GRANTED. The facial challenge under the Equal Protection Clause in count three of the ALBC Plaintiffs amended complaint is DISMISSED for lack of subject matter jurisdiction. The motion by the ALBC Plaintiffs for reconsideration of the courts order denying their motion for a partial summary judgment as to count three of their amended complaint is DENIED. The motion by the ALBC Plaintiffs for entry of a permanent injunction is DENIED as moot. Judge Thompson will file a separate opinion concurring in part and dissenting in part. It is further ORDERED that the ALBC and Newton Defendants motions for summary judgment are DENIED. After careful consideration of the briefs and evidence, the Defendants have failed to persuade the court that there are not genuine disputes as to material facts and that the Defendants are entitled to judgment as a matter of law

08/02/2013 174 MEMORANDUM OPINION AND ORDER: On consideration of the motions, reply, and response (Docs. 95, 106, 107, 108, 109) as well as supporting and opposing authority, it is ORDERED that the motion by the State defendants for a partial summary judgment as to the claim of partisan gerrymandering in count

three of the amended complaint filed by the Black Caucus plaintiffs is GRANTED. We DISMISS the facial challenge under the Equal Protection Clause in count three of the amended complaint filed by the Black Caucus plaintiffs for lack of subject matter jurisdiction. The motion by the Black Caucus plaintiffs for reconsideration of our order denying their motion for a partial summary judgment as to count three of their amended complaint is DENIED. The motion by the Black Caucus plaintiffs for entry of a permanent injunction is DENIED AS MOOT.

08/02/2013	175	THOMPSON, District Judge, concurring in part and dissenting in part with 174 MEMORANDUM OPINION AND ORDER.
08/06/2013	182	Corrected Joint Stipulations of Facts
08/12/2013	187	NOTICE OF APPEAL filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr. as to 165 Order entered 7/30/2013, and the 174 Memorandum Opinion and Order denying plaintiffs' motion for a permanent injunction entered on 8/2/2013.
08/13/2013	188	Amendment to Joint Stipulations of Facts

08/21/2013	194	ALBC Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law
08/21/2013	195	NEWTON PLAINTIFFS' Notice of Filing and Proposed Findings of Fact and Conclusions of Law
08/21/2013	196	Proposed Findings of Fact and Conclusions of Law by Jim Bennett, Gerald Dial, Jim McClendon, The State of Alabama
12/20/2013	203	MEMORANDUM OPINION AND ORDER as further set out in the opinion and order.
12/20/2013	204	THOMPSON, District Judge, dissenting re 203 Memorandum Opinion and Order.
12/20/2013	205	FINAL JUDGMENT: In accordance with the prior proceedings, opinions, and orders of the court, it is the ORDER, JUDGMENT, and DECREE of the three-judge court that in (1) civil action 2:12-cv-691 judgment is entered in favor of Defendants the State of Alabama, the Secretary of State of Alabama, Gerald Dial, and Jim McClendon and against Plaintiffs Alabama Legislative Black Caucus [et al.] and (2) in civil action 2:12-cv-1081, judgment is entered in favor of Defendants the State of Alabama, the Secretary of State of Alabama, the Governor of Alabama, Gerald Dial, and Jim McClendon and

against Plaintiffs the Alabama Democratic Conference [et al.]. Costs are taxed against Plaintiffs in civil action 2:12-cv-691 and in civil action 2:12-cv-1081. The Clerk of the Court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil [sic].

01/06/2014	207	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES as to 205 Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
01/14/2014	210	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES as to 205 Judgment, 203 Memorandum Opinion and Order, by Alabama Democratic Conference, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS; et al.,

Plaintiffs,

vs. CASE NO.: 2:12-cv-691-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

DEMETRIUS NEWTON, et al.,

Plaintiffs,

vs CASE NO.: 2:12-CV-1081-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

* * * * * * * * * * * * * * * *

NON-JURY TRIAL – VOLUME I

* * * * * * * * * * * * * * * *

* * *

[1-24] GERALD DIAL

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

* * *

[1-26] Q. So one of your goals was to make redistricting this time more transparent than in the past.

A. Yes. In the past, even though I had been a majority member of the party who redistricted, I was never included and never consulted with, and I wound up with what I got was what I had. So I thought I would be in a position to include more legislators.

* * *

[1-27] Q. Let's look at those guidelines for a second. This is Exhibit C-1, which I'll – and I want to ask you. It says right up here on the first page, it talks about one person, one vote. [1-28] Was that an important consideration?

A. It certainly was. And we were concerned with that so that we could get a plan that would meet the Justice Department guidelines and so we – that's why we changed one portion of the guidelines, and we went to plus or minus 1 percent rather than 5.

Q. Were you also concerned that one person, one vote was necessary to avoid lawsuits after the plan was precleared?

A. Yes.

Q. And was it also an important goal to comply with the Voting Rights Act?

A. Absolutely. Yes, sir.

Q. And did that affect how you proceeded as you drew the plan?

A. Yes. That was one of my major goals in asking to be chairman. I wanted to see if we could not pass a plan that would meet the voting rights requirement, and that was one of our ultimate goals.

Q. I see down here at paragraph two where I have my finger that it talks about the necessity of avoiding retrogression. And how did you understand that as you drew the plan?

A. That we could not in any plan reduce the number of black votes in any district that had been determined to be a majority black district.

Q. Well, first, you wanted to create as many African American majority districts as possible; is that correct?

A. That's correct, but we also understood there were already [1-29] established numbers that had been established under the last redistricting plan, and we were committed not to regress those.

Q. Either in terms of number or in population.

A. Correct.

Q. And you understood that the population levels of the last plan had been precleared; is that correct?

A. That's correct.

Q. And had not suffered any Section 2 attack?

A. Correct.

Q. Was it also important – and I'm looking at the same exhibit on page 3 of 8 – to avoid contest between incumbents?

A. Yes. The commitment that we had made is not to put any two incumbents in the same district within the Senate plan.

Q. And also, to the extent possible, to protect communities of interest?

A. Yes, as much as possible.

* * *

[1-36] Q. And where did you start to draw the plan?

A. Started to draw the plan with the black districts, the minority districts in this case, because of meeting the requirements of the Voting Rights Act, realizing that our commitment was not to regress any of those districts. Each of those districts had to expand. Every minority district in this state had lost population and had to grow.

Q. And in addition to losing population, had those minority districts been systematically under-populated in the 2001 plan?

A. Yes. And when we changed to plus or minus 1, it drastically required each one of them to gain a significant number of population. And I realized in that gaining of population, to keep from regressing the district and increasing that population, we had to increase it percentagewise on the same number of minority votes that we had. And so that created a problem, realizing the whole plan is like a domino. If you change one district, you effectively change the whole state. So I began by drawing the minority districts and worked from there out. And basically what we had left was basically filling in the blanks with what was left after we did the minority districts.

Q. So in other words, you began by finding enough people to [1-37] bring the minority districts back up to population within the plus or minus 1 standard?

A. That's correct.

Q. And that included bringing the African American populations of those districts up to approximately equal as best you could with what it had been in 2001?

A. Yes. And we were able to accomplish that almost 100 percent.

* * *

Q. Okay. And did Senator Hank Sanders attend that hearing?

A. Yes.

Q. Did he at that time give you any instructions about his district or about African American districts in general?

A. He did both. I had talked to Senator Sanders. He realized his district had to grow. And I had made a commitment to him and others that we would not put any two incumbents together. So he gave me some instructions on how he thought his district should grow. He also told me, and it's public record, that he felt like that the minority districts should be at a minimum 62 percent minorities.

* * *

[1-38] A. Well, basically, he said that I'll have to grow, and I would have to grow basically into Senator Keahey's district. He needed part of, basically, Choctaw and Marengo. He wanted to keep Lowndes, as I remember, in one county district.

And one of the things we were trying to do, he had a small sliver of Lowndes that allowed him to get into Autauga County, and he – basically, we wanted to get him out of Autauga [1-39] County. He wanted out, so he wanted to put Lowndes all into one county. I think he gave me about four or five suggestions. I was able to accomplish two or three of those.

Q. And did he also make a suggestion to you about what should happen to the African American members of Senator Keahey's district?

A. Well, basically, they would have to go into his district in order for his district to pick up the numbers he needed and to increase the population he had to have. He needed minorities to do that if we were going to keep the – not regress his district.

JUDGE THOMPSON: That's District 22?

MR. WALKER: That's –

THE WITNESS: Yes. That's correct.

MR. WALKER: District 22, yes, sir. Senator Keahey's district.

Q. Did you meet with other democratic senators; for example, the democratic senators from Birmingham?

A. Yes. I met with all the senators, and I met with Senator Smitherman, Senator Coleman, and Senator Dunn.

* * *

[1-40] Q. This is the actual exhibit. This is what Senator Smitherman actually brought to Senator Dial; is that correct?

A. That's correct, yes.

Q. And was he representing the Jefferson County Democratic senatorial delegation?

A. Yes. I had met and gone over with Senator Smitherman and Senator Dunn and Senator Coleman that their districts had to grow, but – again, populationwise. And this Jefferson County thing is very complex, so I asked them to – Senator Smitherman informed me that he had worked on a plan; that he had a plan that would meet the guidelines. I asked him to bring me that plan. He brought me this plan. He brought me the plan, and we [1-41] encompassed this plan into the Senate Dial 2. It's probably 99.9 percent what they brought us and what both – all three of those people agreed on.

* * *

[1-42] Q. Well, now, that's an interesting point. You couldn't please every senator, could you?

[1-43] A. I'm not sure I pleased any of them. I didn't please myself, so I'm not sure how many – but that's very difficult to do.

Q. But Republican and Democrat, people left your office from time to time unhappy.

A. Very unhappy. And our job was to get a plan, as I began to, that would meet Justice and do the best we can to reapportion one person, one vote.

Q. So throughout the drawing of this plan, you were balancing on one hand the requirements of meeting the law, the constitution, one person, one vote, the requirements of the Voting Rights Act and the guidelines, versus the individual wishes of Republican and Democratic senators. And you had to count votes in that process, didn't you?

A. Got to have enough to pass it, and I can't create an opportunity where I at least can't have enough votes for cloture.

* * *

[1-45] Q. Tell the Court about your efforts to work with Senator Keahey. As we've said, Senator Keahey is District 22, and he's a white Democrat; is that correct?

A. That's correct.

Q. And what was the issue with Senator Keahey?

A. Well, the problem with Senator Keahey's district is it goes back to Senator Sanders' district having to grow and having to grow in minorities. And when I moved Senator Sanders into – to pick up the minorities he needed, it pushed Senator Keahey south. Baldwin County had created some growth in that area, and there was too many people in Baldwin County, so it forced Senator Keahey down into the northern part of Baldwin County. So it changed his district pretty drastically.

* * *

[1-54] CROSS-EXAMINATION

BY MR. BLACKSHER:

* * *

[1-55] Q. Race was the factor that drove most of this entire Senate plan?

A. Trying to meet the voting rights requirements was the basis on which I drew the plan.

Q. And to be clear, the retrogression standard that you applied required not only that you maintain the 27 majority black House districts and the eight majority black Senate districts, but that you maintain the black majority percentage, the level, the size of the black majorities in those districts; is that correct?

A. Yes, sir. I concentrated my effort on the Senate districts and had very little input into the House plan.

* * *

[1-56] Q. In fact, you considered that as high – that the higher the size of the black majority, the better as far as the Voting Rights Act was concerned; is that right? You testified, didn't you, that you did not consider any black percentage too high?

A. On the plan that we adopted, that's correct.

* * *

Q. And you thought that the plus or minus 1 percent restriction of overall population deviation in every district was something that would help you get Section 5 preclearance in the Justice Department.

A. Correct.

Q. In fact, as you said in your affidavit, the first one you filed in this court, your objective was to construct guaranteed black safe districts, right?

A. Correct.

Q. You thought that would be a safe harbor under Section 5 of the Voting Rights Act?

A. I thought that would be the primary way that we could get this plan approved by Justice.

[1-57] Q. In fact, you said that when you were drawing this plan, you didn't consider partisan data at all. You were only focused on the racial data. Isn't that right?

A. What I was focusing on was not regressing the minority districts so we could get a plan approved by Justice Department.

Q. Okay.

* * *

[1-63] Q. So what you're saying, Senator, is that in pursuing your overriding goal of maintaining the large black majorities in the majority black districts, if that resulted in blacks being taken out of the majority white districts, diluting their influence in those majority white districts, that was just collateral damage? That was just an accident or the results you get because of pursuing the Voting Rights Act?

A. That was because of the Voting Rights Act.

Q. So we can blame the Voting Rights Act for the loss of black influence in the majority white districts?

A. Absolutely.

Q. Specifically, we can blame Section 5 of the Voting Rights Act, the preclearance requirement.

A. Preclearance.

Q. Yes.

A. Preclearance is what – that was our ultimate goal.

* * *

[1-67] Q. What instructions did you give Randy Hinaman?

A. What instructions? I gave him the – I told him to draw in the Smitherman Coleman Dunn plan. I told him that I would – I didn't want any two incumbents in the same district. And I wanted to, as we looked at the plan, how did we make and fill in the number of minorities to insure that we did not regress the [1-68] minority districts.

* * *

[1-69] Q. Okay. The instructions you gave Randy Hinaman were twofold. Isn't that correct? One, do not retrogress the majority black districts as per your standards.

A. Correct.

Q. And two, don't put two incumbent senators in the same district.

A. Correct.

* * *

[1-70] Q. * * *

So you testified that the necessity of making sure that the black majority percentages stayed as high as they appeared on the retrogression chart, that caused the districts, for example, Senate District 1 that goes all the way into Madison County, it affected Roger Bedford's district, which is Senate District 7.

[1-71] A. Correct.

* * *

[1-73] Q. Your first priority was population equality, right?

[1-74] A. Yes.

Q. Your second priority is Sections 2 and 5 of the Voting Rights Act, right?

A. Yes.

Q. Your third priority is, again, no district will be drawn in a manner that subordinates race-neutral districting criteria to considerations that stereotype voters on the basis of race, color, or membership in a language minority group.

That was your third priority, right?

A. Yes.

Q. Your fourth priority is contiguity and compactness. Right?

A. Correct.

Q. And the fifth priority was to follow the requirements prescribed by the Alabama Constitution.

A. Correct.

Q. And the sixth priority: The following redistricting policies contained in the Alabama Constitution shall be observed to the extent they do not violate or conflict with the requirements prescribed by the Constitution and laws of the United States.

And the first requirement under that is, each House and Senate district should be composed of as few counties as practicable.

And then your seventh requirement was traditions, customs, and usages, including contests between incumbents.

[1-75] So preserving county boundaries in your guidelines had a higher priority than protecting incumbents, didn't it?

A. And we said where practicable. And where it was practicable to do that, we did it.

* * *

Q. Okay. And what made it impractical to give county boundaries a lower priority than incumbent protection?

A. The Voting Rights Act and not regressing the minority districts.

* * *

[1-77] A. I'm sure – I recognize Senator Sanders, the bill he introduced, yeah. I'm not – I can't verify that that's it from my – my point of view, but he introduced a plan.

Q. That keeps Mobile County whole and takes care of the extra population in Baldwin County, doesn't it?

A. Yes, but it totally regressed the minority districts.

Q. And, in fact, your testimony in your deposition was that the only reason that you rejected the SB 5 plan was because it did not maintain the high black majority percentages, right?

A. Right.

Q. It had eight majority – voting age black majority districts, but it did not have the same high percentages. Right?

A. Right.

* * *

[1-78] CROSS-EXAMINATION

BY MR. TANNER:

* * *

[1-81] Q. The Justice Department guidelines that you reviewed do mention, however, the obligation to avoid fragmenting minority concentrations. Is that not correct?

A. * * * My goal was, based on what had happened in prior reapportionments, to not regress the minority districts in this state. All of them had to grow by population. And if they grew in population, they had to grow in the same percentage that they already have and not regress that district. * * * So that's my understanding of what we needed to do as far as meeting the guidelines of the Justice Department on not regressing minority districts.

* * *

[1-96] Q. * * *

Well, before we get into that. You've testified about how you were unwilling to lower the minority percentage in any district to avoid your view of what regressing was – retrogressing.

A. That's correct.

* * *

[1-124] A. But as I said earlier, if I had not had to contend with the Voting Rights Act, you could have seen quite a different map than you see today. But remember, that was the first priority, to make sure that we did not regress the minority districts. And as the minority districts grew, we would not regress the number of minorities in those districts. That was the plan which I began to work from, and I worked from that out.

* * *

[1-131] Q. Now, if you do the math, which I should have done on the chart, in redrawing these districts, you added 14,826 people to District 26; and of those 14,826 people, only 36 were white. And if you had not added a single black person to that district, if you had added those 14,826 people, if you could do it so every single one of them was white, the district still would have been over 64 percent black. And that would be plenty for Senator Ross to win reelection, wouldn't it?

A. That would have regressed the district, would it not?

Q. Would it have been – the answer is no. But it would have [1-132] been plenty for him to get reelected, wouldn't it? Do you have any doubt that Senator Ross would be able to get reelected in a district that's 64 percent black?

* * *

[1-135] Q. And you rejected – you testified you rejected Senator Sanders' plan because you understood that you couldn't lower the black percentage in any district.

A. That's correct.

* * *

[1-136] Q. So your testimony is that you really didn't look into the behavior of individual districts. Instead, you simply went by the black – the number of black people, the black percentage in the district,

and what you did was try and at least maintain that or increase it. Is that your – fair statement of your testimony?

A. That's fair, yes.

* * *

[1-137] A. My contention was that if we regressed the number of minority districts in population or in number, that we would not meet the guidelines of the Voting Rights Act, and ultimately the Court would probably draw the district lines in the state of Alabama like they're doing in other states.

Q. Why did you believe that the Justice Department would go contrary to the considered judgment of every black member of the Alabama Legislature? On what do you think they would base that [1-138] decision?

A. Based on what they had done in other states, in Florida and Texas and other states, and throwing out their plans and the courts stepping up and drawing plans for whatever reason. And our ultimate goal was to draw a plan that would be approved by the Justice Department, which I did. The Legislature approved and the Justice Department has approved this plan that we drew.

Q. On whose – who told you about this besides Senator Walker? Whose advice did you take as to finding this, what sounds like a bright-line standard, that whatever you got, you can't go under it from the

Justice Department? If it's a 99 percent black district, you can't go to 97? On whom – where did you get this?

A. Simply from my experience and in talking with our attorney, that we could not regress or we should not regress. If we wanted to pass a plan that would meet Justice Department, we could not regress the minority districts in number of districts and in the number of population within those districts.

Q. And it's your testimony that Mr. Walker told you that?

A. In our discussion, yes.

* * *

[1-139] REDIRECT EXAMINATION

BY MR. WALKER:

* * *

[1-146] Q. Are you claiming, sir, that Dial 2 is perfect?

A. No, sir.

Q. Are you claiming it's the only possible way to draw districts?

A. Oh, no, sir.

Q. Are you confident that the plan is fair in the way it draws districts of near equal size?

A. Yes.

Q. Are you confident that you did not have any intent to discriminate against anybody on the basis of race when you drew that plan?

A. Yes.

Q. Does it put all 35 senators elected in 2010 in separate districts instead of putting incumbents together?

A. Yes.

Q. Did it keep the same number of minority districts that you had before?

A. Yes.

Q. And it kept those districts about the same minority [1-147] proportions as they were before, right?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS; et al.,

Plaintiffs,

vs.

THE STATE OF ALABAMA, et al.,

Defendants.

CASE NO.: 2:12-cv-691-WKW-MHT-WHP

DEMETRIUS NEWTON, et al.,

Plaintiffs,

vs

THE STATE OF ALABAMA, et al.,

Defendants.

CASE NO.: 2:12-CV-1081-WKW-MHT-WHP

* * * * * * * * * * * * * * * * *

NON-JURY TRIAL – VOLUME II

* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE WILLIAM H. PRYOR, United States Circuit Judge, presiding, THE HONORABLE MYRON H. THOMPSON, United States District Judge, and THE HONORABLE W. KEITH WATKINS, United States District Judge, * * *

APPEARANCES

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* * *

[2-6] RODGER SMITHERMAN

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

* * *

[2-36] CROSS-EXAMINATION

BY MR. WALKER:

* * *

[2-40] Q. Are you claiming that Senator Dial is a racist?

A. No. I'm not saying Senator Dial is racist at all. I knew Senator Dial before I even became a senator. Tell you the truth, he – I worked with him on drafting of the sports agent bill, and I was – I wasn't even a senator then. So I've known Senator Dial for a long time. No, not at all. I'm saying that the plan is racist. I'm not saying that Senator Dial is by no means.

Q. Well, are you saying that he drafted it for a racist purpose?

A. No. I think he drafted it so that the county would be controlled by the people in his party. And to do that, he had to disenfranchise the people in the county because the majority of the people who was placed in the plan, majority of their districts are outside of the county.

* * *

[2-66] WILLIAM S. COOPER

The witness, having previously been duly sworn to speak [2-67] the truth, the whole truth and nothing but the truth, further testified as follows

* * *

[2-109] CROSS-EXAMINATION

BY MR. PARK:

* * *

[2-122] Q. You talked about county splitting. Let me represent to you that in the 2012 House plan, Blount County is split into four House districts. Do you know whether Blount County is majority white or majority black?

A. I believe it's majority white.

Q. In fact, Blount County, according to the census, is 1.3 percent black. Do you think that the county splitting is because of race?

A. No. I think the county splitting in north Alabama, generally speaking, except with the exception perhaps of a Senate district that goes across Lauderdale and Limestone into Madison County, is maybe more politically motivated. I don't [2-123] know. I mean there's Blount County, and then I think it's Dekalb County that's split six ways. That's a majority white county with a significant Hispanic population, but I can't really imagine that the objective there was to split the vote of Latinos. So I don't know what all the motivations were in north Alabama.

Q. Let me tell you that all four of the representatives who have a piece of Blount County in the new plan are Republicans. Does that tell you it's not partisan, too?

A. I don't know. There could have been some sort of interparty squabble, or it could just be random. I don't know exactly what was in the map maker's mind, Mr. Hinaman, when he was doing this map. So you'll – you know, I'll just have to draw a blank on that. I don't know the motivation.

Q. So you just draw a blank rather than speculating?

A. Well, it's not appropriate to speculate, I guess.

Q. Let's look at Marshall County. Marshall County is split five ways. Again, Marshall County is 1.6 percent black. Is that because of race?

A. Apparently not.

Q. And, again, it's all Republicans. Do you think that's because of political party considerations?

A. It could be, but it's still not good redistricting practice.

* * *

[2-124] QUINTON ROSS

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

[2-125] DIRECT EXAMINATION

BY MR. TANNER.

* * *

[2-129] Q. And what is – what's the racial composition of that district?

A. According to the new plan, it's about 71 percent black.

Q. And is that higher or lower than it was under the old plan?

A. It's much higher.

Q. Now, your district was underpopulated. And I need to correct a misimpression that I left yesterday due to my failure to include charts. Your district was underpopulated by I believe 15,898 people?

A. Yes, sir.

Q. And if you added 16,000 white people, no black people, your district would have been more – little over 64 percent black. Would you have been comfortable in terms of the opportunities for the voters, black voters in your district in a district with a 64 percent black majority?

A. Yes, sir.

Q. How long would you be willing to go in terms of the black [2-130] percentage in your district and still feel comfortable?

A. Well, I like to believe I have good political standing, so 50, 55 percent. 50, 60 percent.

Q. And instead of 16,000 white people, they added 15,785 black people, including only 36 white people. How easy is it to find, outside your old district especially, an area with 15,785 people, of whom only 36 are white? Is that possible?

A. You have to make sure you look hard to find them.

Q. Now, would you like to have more white population in your district?

A. Sure.

Q. And if they did lower – you said you would feel comfortable with 55 or 60 percent. You've got 75 percent now.

A. Yes, sir.

* * *

[2-135] JUDGE THOMPSON: Let me ask you this, Senator Ross. Did your district lose any white areas?

[2-136] THE WITNESS: It lost, if I'm not mistaken, splits of the precinct. The precincts caused some whites to be shifted out.

BY MR. TANNER:

Q. Have you reviewed the precinct splits, Senator Ross, under the new plan?

A. Yes.

Q. And what do they have in common?

A. All of them basically, you know, shifted substantial number of blacks into my district but reducing the amount of whites that I had in there.

* * *

[2-152] REDIRECT EXAMINATION

BY MR. TANNER:

* * *

Q. Now, under the new plan, the district drawn by the Senate crosses the Southern Bypass, does it not?

A. Yes, sir.

Q. And it crosses it to take in black population?

A. Yes, sir.

Q. And it breaks up this natural dividing line –

A. Yes, sir.

Q. – to the effect of moving black population into your district?

A. Yes, sir.

* * *

[2-154] JOE L. REED

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

[2-155] BY MR. ANDERSON:

* * *

A. My name is Joe L. Reed. R-E-E-D. I live at 874 John Brown Avenue, Montgomery, Alabama 36106.

* * *

A. Yes. What's the Alabama Democratic conference?

Q. Yes, sir.

A. Alabama Democratic Conference is an organization, a [2-156] Democratic organization that was founded in 1960 for the purpose of advancing blacks politically in Alabama and to get influence in the political process. We participate in voter registration.

We participate in lobbying. We participate in begging. We participate in anything we can do to advance blacks in general and – Alabama in general and blacks in particular.

* * *

[2-157] Q. Why have you been involved and why has your organization been involved in these redistricting cases?

A. Well, in 1970 I ran for the Legislature from Perry, Marengo, and Sumter counties, and I didn't realize how the district lines were drawn. I ran and ran for that office all over the black belt, and I didn't realize those lines were drawn in such a way that I couldn't win. And so I lost that election. Maybe it was a blessing in disguise.

Then in 1975, Montgomery went from a commission form of government to a mayor council form of government. When the district lines were first drawn, there were two majority black districts and seven majority white districts. I thought that was unfair, and I set out to draw some lines myself, and that's when I first started drawing lines.

* * *

[2-158] But that's what really got me involved, when I realized that reapportionment plans can achieve whatever results the drafter wants them to achieve. There's no perfect reapportionment plan. A reapportionment plan depends on what the drafter wants to get, and he can draw them many, many,

many ways. So I started drawing them because that's the results I wanted when I drew a plan.

* * *

[2-159] Q. And at that time, did you have an opinion about what type of percentage of voters in a district would be needed in order – of people that were – that lived in a district, the population in the district, the percentage needed to be to assure an election of a black official?

A. For a long time, I labored under the theory that – and even in some instances maybe even applied today, but not as much as it did then – that you needed about 65 percent blacks to get a safe black seat. Once you counted the unregistered voters, once you counted the low turnout, once you counted those who were living but not even qualified to vote, all of those factors played into it. But I was talking about 65 percent. I'm talking about 65 percent for the population. But you put all the mix in, registered and unregistered, and those who are even unqualified – there are a lot of blacks who are just unqualified to vote in the sense that they have – may have prison records because of our criminal justice system. So all of that fed into my decision and my conclusion as to what it would take to have a safe black district. I have modified my position somewhat since that time.

[2-160] Q. And what is the reason that you – I've been going historically. You felt like 65 percent because of these other factors about who would actually vote?

A. Yes.

Q. But what's led you to modify your position from the 1970s?

A. We have registered more blacks. More blacks are registering. A few more whites have voted for blacks. A few more. All of those factors come into it. And we think that 60 percent – I mean 60 percent now is a safer – that's what – that's what I prefer.

Q. Your opinion today is around 60 percent?

A. Around 60 percent. Now, there may be – sometimes you can't get 60 percent. You have to take what you can get, take the hand that's dealt you, and go with it. Sometimes you don't have the people. So if you have 55 percent, okay. If you got 53 percent, okay. Take what you can get and go with it. But my overall goal would be a safe district now would be about 60 percent.

* * *

[2-164] Q. Going to drafting districts, which you've said you had some experience with. And you understand, from time to time the – the state constitution says that we're supposed to keep these legislative districts within county lines. You know with one man, one vote, that hasn't happened. You've drafted plans where you've crossed county lines.

A. Yes. We call those – and we started this, really, back in 1983, what we called, Jim, the county line plan, where I think Jim Blacksher was the first

one to call to my attention what the Alabama constitution said when we were drawing the plan. I drew that plan in 1983. And we called splits necessary splits and unnecessary splits. We split some counties then, but there was some unnecessary splits that we did not – some counties, we did not make with what we could possibly get around.

* * *

[2-165] Q. And some of those plans you split voting precincts also?

A. Yes. We split voting precincts because that's going to happen anyway.

* * *

[2-166] A. I went to the hearings. Sure I did. He said, you got three minutes. I said, take me three minutes to clear my throat. I said, I can't talk to you about a reapportionment plan in three minutes.

* * *

[2-168] Q. Yes, sir. And in this plan, for example, House District 73, which was the district I live in in Montgomery, represented by Joe Hubbard now, had been – in the plan that the Legislature passed was moved to Shelby County. You kept House District 73 in this plan, didn't you, in Montgomery?

A. Yes. We didn't try to change House District 73.

Again, you go back, a drafter can achieve a lot of things he wants to achieve. For example, if I had just

really set out to do it, I could have gotten another black district in Montgomery. I didn't do that. I told Joe Hubbard, I said, what we're going to do is this. We're going to – what we're going to do is this. We're going to keep all the districts, the Republicans and the Democrats, alike. I told Joe Hubbard, I said, we're going to reduce your numbers a little bit from 48 percent black down to maybe around 40 percent because, I said, you get too many, some black is going to run against you, and we [2-169] can't stop it. So I think we ought to have kind of a diverse Legislature, representatives in the Legislature. I do believe that. And Joe has been doing all right. And we got along with some others, too. So we didn't try to change Democrats or Republicans in the whole state. We left – that's why I called it the status quo.

* * *

[2-196] BERNARD SIMELTON

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. TANNER:

* * *

[2-205] Q. Let me move from the Latino population to another important population in Alabama. Does the NAACP and your local branches have any relationship with the Mowa Band of the Choctaw Nation down in south Alabama?

A. Right. We have worked with them on trying to get their federal recognition. As a matter of fact, in 2012 – let's see – I think it was 2011, we went to our national convention, and we were able to get a national resolution passed through our national organization in support of the federal recognition of the Mowa Choctaw Indians.

Q. And at the local level, to your knowledge, down in Washington County and Mobile County where the Mowa mainly live and in Escambia County where other native Americans live, is there a good, close, working relationship with the –

A. I can speak for the Baldwin County area and Washington County. Mobile County, I know they work real closely with the Vietnamese community there, but I know Baldwin County and Washington County work with the Mowa Indians.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE
BLACK CAUCUS; et al.,

Plaintiffs,

vs. CASE NO.: 2:12-cv-691-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

DEMETRIUS NEWTON, et al.,

Plaintiffs,

vs CASE NO.: 2:12-CV-1081-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

* *

NON-JURY TRIAL – VOLUME III

* *

BEFORE THE HONORABLE WILLIAM H. PRYOR, United States Circuit Judge, presiding, THE HONORABLE MYRON H. THOMPSON, United States District Judge, and THE HONORABLE W. KEITH WATKINS, United States District Judge, * * *

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* * *

[3-49] THEODORE S. ARRINGTON

The witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ANDERSON:

* * *

Q. Okay. As a technical term – we've all heard gerrymander, but explain to the Court what you mean by the – that you thought the 2000 plan that was adopted by the Legislature was a [3-50] dummymander.

THE WITNESS: Your Honor, there's such a thing as being too smart for your own good, and sometimes legislatures do things where they think it's to their advantage, and they get greedy. And it turns out, after a while, that what they thought was to their advantage turns out to be to their disadvantage. And that's sort of what a dummymander is.

JUDGE PRYOR: Is that like being hoisted on your own petard?

THE WITNESS: That's correct, Your Honor.

And I had said in the deposition, and I still agree with this, that if the Republicans had come to me when the 2000 plan was being enacted, I would have been willing to be their expert witness to say that this is a bad plan. It has a number of bad features. One of them is it continues to pack the black districts. And I would have said that's something that shouldn't be done in 2000 and shouldn't be done in 2010.

Q. Why is packing bad and illegal?

A. Sure.

Packing restricts the black community to just those districts that are packed, so that, essentially, their ability to participate in the political process is limited. This is a state that's about 70 percent white. If you're restricted to just 25 to 30 percent of the districts in the Legislature, and you have no ability to form coalitions with whites, then your [3-51] ability to participate politically is restricted. It's not participating equally in the political process.

JUDGE PRYOR: Dr. Arrington, were you saying that the 2000 plan was packed?

THE WITNESS: Absolutely, Your Honor. In fact, the 1990 plan was packed. And Your Honor, the reason for that is that after the *Gingles* case, state legislatures understood that they had to create majority black districts. But we didn't know – and I include myself in that because I was drawing districts at that time – we didn't know what level of concentration was necessary to give minorities a reasonable opportunity

to elect candidates of their choice. Also, since that redistricting and since the 2000 redistricting, the ability of blacks especially to mobilize, to get registered and to actually get out and vote, has exploded. And the Chief Justice noted that when he declared Section 4 of the Voting Rights Act unconstitutional, that blacks are mobilized today at the same rate as whites. And if they're mobilized today at the same rate as whites, and you have a district that's just majority black by voting age population, and the cohesion of blacks tends to be 90 percent plus, and you're getting at least 20 percent of the whites to vote for them, that's plenty for them to have a reasonable opportunity to elect a candidate of their choice without restricting their ability to deal in the adjoining districts; to join with white Democrats and have a fighting [3-52] chance to win. Not a sure thing, but a fighting chance to win.

Q. You mentioned packing throughout your testimony. You also mentioned cracking. What do you mean when you say that they're cracking a district?

A. The process of gerrymandering is very simple. First you take the other guy's voters and pack them as much as you can. But you can't pack all of them into a few districts – some are left over – so you take the ones that are left over and you distribute them in the remaining districts in such a way as they're powerless there. So you pack and then you crack what's left over.

And you can see that in these plans, in the sense that in addition to the packing, they then took the remaining blacks and separated them so they were always less than about 35 percent of the population in any of the remaining districts. Which means that's small enough that blacks would not be able to say to white Democrats in such districts, hey, if we move together, we can win this district. But if you go to white – white officeholders, white voters and the like, and you say, coalesce with us and we can win this district, if that's not possible, then no such coalitions will ever be formed.

JUDGE WATKINS: Dr. Arrington, you said "these plans."

THE WITNESS: The enacted plans.

JUDGE WATKINS: Are you talking about historical plans, the two prior ones, or are you just talking about the plans that [3-53] are at issue in this case?

THE WITNESS: All three of them.

JUDGE WATKINS: The 1990, the 2000, and the current one?

THE WITNESS: But Your Honor, here's the difference. In 2000 Democrats were getting 35, 40 percent of the white vote. And if you're getting 35 or 40 percent of the white vote, then you can pack the black districts to some extent, you can engage even in some cracking, and the white Democrats can still win. But if the Democrats are only getting 20 percent of

the white vote, then it becomes a very different game. And that's what really changed.

That's why the Democrats did what they did in 2000, and they thought they were being smart. But once things changed, especially after 2010, then what looked smart in 2001 and 2002 turns out to have been very bad; especially bad for blacks because it means it cuts them off from the ability to form those coalitions that they have to have if they're going to be players in Alabama politics.

* * *

[3-56] Q. You had some criticism in your direct, and they asked you this on your cross, about what I call the 2 percent rule, which is 1 percent variance each side, vis-a-vis the 5 percent rule that – in previous plans. Can both of these percentages be manipulated, and, compound question, is one easier to manipulate than the other?

A. Just on the face of it, just on the face of it, there's more room for manipulation, good or bad, in the 10 percent rule than in the 2 percent rule. That's not the way the 2 percent rule has been used here, I think. I think the 2 percent rule was used as a way of saying, once we've done that, once we've said we have to pack these black districts because we won't get [3-57] approval from the Department of Justice, and we have to stay within 2 percent, that allows them to draw a plan which, essentially, has no redeeming features at all. If you say you didn't follow county boundaries, well, you can't. If you say you have to

shift a district out of Birmingham, well, you have to do that.

It's what I call the devil-made-me-do-it approach. It gives them protection against any argument that the plan is deficient on any basis, either when presenting it to the public or when presenting it to the courts.

Here's the problem, the way I see it. The Legislature can adopt a 2 percent plan. That's not on its face unconstitutional. I understand that. But you have to ask the question of some kind of proportions. The advantage of a single-member district system is that you're representing people, but you're representing them in terms of the places where they live and identify with. The district has a meaning because the people who live there know what it is and the representative knows what he represents or what she represents.

If you go to 2 percent, then you essentially create districts where they're all about the same size, same population, but they have no meaning. You can't say, well, this is the central Birmingham district and this is the – this is the Dauphin Island tourist district. They're just collections of people. Which it's one person, one vote, all right, but it [3-58] lacks any meaning.

And once you – once you've freed Mr. Hinaman to draw a plan which has no meaning at all, he can pack and crack as much as he wants to, and it doesn't

matter, because everything he did, the devil made me do it.

* * *

[3-69] CROSS-EXAMINATION

BY MR. WALKER:

* * *

[3-77] Q. * * * [3-78] And then in your direct testimony, in paragraph 44, you say Dr. Brunell, who has not testified yet but who will, has opined that the concentration at which the opportunity to elect as president would not be the same everywhere in Alabama. You agree with him, but then you say a minimum can be set that would apply everywhere, which seems contradictory to me, so I wanted you to explain that, but not just yet.

A. No. That minimum is 50 plus one. The point is that based upon Dr. Lichtman's testimony – he'll testify later – my own examination of the academic literature on Alabama elections and miscellaneous other voting rights cases in this state, it's clear that 51 percent minority VAP –

Now, we're talking VAP, not pop, remember –

Q. Right.

A. Pop would be somewhat higher than that.

Q. I understand.

A. – is enough to give minority voters that opportunity anywhere in the state. Now, in some

places in the state, that's more than you need. But everywhere in the state, that's enough.

Q. Then why do you come down here and later say, certainly 54-56 – and I assume you mean VAP concentrations – is enough?

A. Yes. Well, all I'm saying is, okay, if you want to fight about 51, you don't think that's enough, certainly when you get to 54 or 56, there's no longer any reason for anybody to doubt [3-79] it.

Q. And that would be statewide, you're telling the Court, without any variation according to where you are in the state?

A. No. I'm only saying if you want to fight about 51, if you don't think that's quite enough, all right. Maybe you go to 54 or 56. But 51 is enough. And Dr. Lichtman's data shows that. And that's all I'm saying in saying, you know, in some places you're going to have difficulty finding whites to bring into those districts. So if it drifts up to 54 or 56, that may be what you need to do.

Q. Look at this sentence that I'm indicating right here: A minimum can be set which would apply everywhere. Everywhere in Alabama.

What is that minimum? Where do you see that minimum?

A. It's 51 percent.

Q. 51 percent?

A. Yes. Or 50 percent plus one person, if you want to look at it that way.

Q. Okay.

A. I mean there is law that suggests that it has to be that if you're going to count it as a minority district. And I say that in the report as well, that it may be that there is a legal standard that requires it to be majority minority in that sense. And that's – you know, that's the *Bartlett versus Strickland* case. So okay. So up it to that. But in some places in [3-80] Alabama, that's not what you need politically.

Q. And above that you would consider packing?

A. Above that considered packing? Again, you look at – if you can make it – if you can do that. If there are places in the back belt where you can't do that, then you might have to go a little bit above that. And that's understandable.

* * *

[3-87] ALLAN J. LICHTMAN

The witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

* * *

[3-98] CROSS-EXAMINATION

[3-99] BY MR. DAVIS:

* * *

[3-107] Q. Here's the question, Dr. Lichtman. If you're using 46.5 or 53 percent voting age population –

A. Yes.

Q. – would you disagree, then, with Joe Reed, who said that in his view, you need about 60 percent?

A. For these districts, I would absolutely disagree, and I think the numbers more than bear that out.

Q. Would you disagree with black legislators who said they thought that they should have 65 percent or so?

[3-108] A. I've been redistricting advisor to a number of states, and my experience is no legislature – legislator ever thinks they're safe enough. They don't want to be 99 percent safe. They want to be 99.99999 percent safe. So I'm not –

Let me finish.

I'm not surprised if what you say is true, but that is not an analysis based on the evidence.

Q. You don't know –

JUDGE PRYOR: No. It is. It is based on the evidence –

THE WITNESS: Yeah, right.

JUDGE PRYOR: – isn't it?

THE WITNESS: Yes, for 99.999999 –

JUDGE PRYOR: You want a safe district. That's the evidence, right?

THE WITNESS: Even then, sometimes strange things happen.

BY MR. DAVIS:

Q. You don't know of any African American legislators, then, who are saying that they want a district that's in the mid forties or that they can win a district that's in the mid forties?

A. I'll answer your question. I don't know what any African American or non-African American legislator has said about anything, because that's not within the scope of my analysis.

* * *

[3-114] RANDY HINAMAN

The witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

[3-115] BY MR. PARK:

* * *

[3-116] the Legislature and precleared by Justice.

Q. And then in 2012, how did you get – after the 2010 census, how did you get involved with redistricting in Alabama?

A. Congressional?

Q. Yes, sir.

A. I was hired by the seven members of the Alabama congressional delegation to draw a map for them that we would share with the folks in Montgomery and work with the Legislature to get something similar to that adopted.

Q. And was that plan passed by the Legislature and signed by the governor?

A. With changes, yes, sir.

Q. And is that the plan that was used in the 2012 congressional [3-117] elections?

A. Yes, sir.

Q. And in 2012, you worked with the entire delegation?

A. Yes, sir. Six Republicans, one Democrat.

Q. And each of those plans was a statewide plan; is that right?

A. Yes, sir.

Q. And each of those plans, being congressional plans, was drawn with zero tolerance?

A. Zero deviation. Yes, sir.

Q. After doing the congressional plan, one question that has come up, did you have any involvement with the State Board of Education plan in Alabama?

A. I did not. I did not draw that plan.

Q. How did you come to be involved in working on the legislative plans for Alabama?

A. Well, after working on the congressional with Senator Dial and chairman – and also Representative McClendon, they talked to me and leadership talked to me about helping out with the legislative districts. Speaker talked to me about helping out as well.

Q. And what kind of schedule did you have?

A. I went to work, basically, September – early September of 2011, yeah, and then worked through the session, end of the session, May 2012.

Q. How did you get started?

[3-118] A. Got started, came down and did a meeting with leadership and Senator Dial and Representative McClendon and talked about some of the rules, the guidelines that were in place that the committee established, as well as some other procedural things that we talked about. And then I went back and started drawing – roughing out a map where I could come back and meet individually with members and fine tune it from there.

Q. Before you were in a position to show a map to anybody, what did you have to do mechanically?

A. Well, mechanically, I wanted to get some vote performance data in so I could look at the various – how districts would perform. So I had to apply election returns from the last eight or so general elections into the plan by precinct. Which obviously, is somewhat more complicated the further back you go, because precincts names change and so forth. So that took a while. And then I roughed out a plan where everything was basically within deviation so that somebody could look at their district in deviation and go from there.

Q. You mentioned some guidelines. What do you recall about the guidelines with respect to deviation?

A. Well, we were overall deviation of 2, plus or minus 1.

Q. And what with respect to any other guideline?

A. Well, the other guidelines were to follow the Voting Rights Act and to not retrogress the overall total number of African American majority districts, as well as to try individually to [3-119] not retrogress the individual districts from the numbers that existed in 2001.

Q. And by retrogress, did that mean that the percentage of total population couldn't come down?

A. I looked at – yeah. Essentially, I tried where possible to not lower the total population of African American population in those minority majority districts.

Q. And what was your reference point?

A. Reference point was 2010 census in 2001 districts.

Q. In the work you did loading information, did you have incumbent addresses?

A. I did have incumbent addresses. Unfortunately, a couple of them ended up either being their office address when it should have been their home address, and they needed to be sorted out at the very end. But, yes, sir, I did have incumbent addresses. And I was also instructed that we were not putting incumbents together to the extent we could avoid it.

* * *

[3-122] BY MR. PARK:

Q. Mr. Hinaman, when you started work on the Senate plan, which districts did you start with?

A. Well, I started with the majority African American districts [3-123] first. And then, obviously, after that, worked around the edges of the map and moved inward, for the most part.

Q. Which are the black majority districts in this plan?

A. In this plan, that would be 18, 19, and 20 in the Jefferson County area; 23 and 24 and 28 and 33 in Mobile.

Q. And also 26?

A. And 26 in Montgomery. Yes.

Q. And when you started work for all – what was the nature of the population status of these black majority districts?

A. They were all underpopulated in comparison to ideal, and I had to find population to repopulate them.

Q. And as a general matter, where would you find that population?

A. Well, obviously, it has to be contiguous, so it would be in a neighboring district by definition.

Q. Now, as you worked on – let's start with Senate District 23 and 24. Senate District 24 was underpopulated. What did you try to do with that?

A. Well, I believe I moved – took it down further into Choctaw and Clark, rural areas, and also took it – about half of Pickens County and put it in there. Probably a little bit more in the Tuscaloosa area, although the differences aren't – it's in more of an urban area, so it doesn't look that different, but it added a few precincts in there as well.

Q. Let me direct your attention to Senate District 30 at this [3-124] time. Senate District 30 includes Butler County, Crenshaw, Pike, and goes through Lowndes to Autauga and Elmore County; is that right?

A. That's correct.

Q. What did you do with Senate District 30?

A. I thought that that – a number of those districts were all underpopulated south of Montgomery, and I thought that what would make the most sense would be to draw a more compact District 30 north of Montgomery. So those areas, including Lowndes, that were south and west of Montgomery were put in other districts. The rest of Lowndes and Butler went in 23, Crenshaw went into 25, and Pike went into 31.

Q. Now, what happened when you pushed Senate District 24 north into Pickens County?

A. Obviously, that had the effect of also moving Senate District 21 north into Lamar.

Q. And in connection with that, was Senate District 5 underpopulated?

A. It was. And obviously, it couldn't very easily go directly east because of the three African American senate districts in Jefferson County, so it took up part of Fayette County or all of Fayette County.

Q. And when you take Lamar and Fayette County away from Senate District 6, what happens?

A. Well, it was obviously – considering started [3-125] underpopulated, and once you did that it was even further underpopulated. Again, about the only place it could go was north, so it went north into Senate District 1.

Q. What was the status of Senate District 2?

A. Senate District 2 was very much overpopulated. I think close to like 40,000 citizens. So 1 moved into 2, the northern part of 2.

Q. And you had to redistribute the population in 2 to meet the ideal population; is that right?

A. That's correct.

Q. So you moved 30 north of Montgomery, and you redistributed down here. When you moved Senate Districts 23 and 24 south into Choctaw and Clark counties, what happens to 22?

A. Well, obviously, it needs population, but that works out well because Senate District 32 in Baldwin County was very overpopulated. So basically, everything north of I-10 in Senate District 32 went into Senate District 22 in Baldwin County.

* * *

MR. PARK: The 2012 proposed map for the 2014 plan.

Q. Again, starting with Senate Districts 23 and 24.

A. Yeah. They picked up population – well, Senate District 2 went north into Pickens and picked up a few extra precincts in Tuscaloosa, and then it went south into the northern part of [3-126] Clark and a considerable amount of Choctaw.

Q. And 23?

A. And 23 picked up the rest of Lowndes, picked up Butler, and picked up a little bit more of Clark, I believe.

Q. And what happened to Crenshaw County?

A. Crenshaw went into Senate District 25, and Pike went into Senate District 31.

Q. And 30 went on north –

A. 30 went all north of Montgomery, which had the effect of pushing Senate District 11 further north as well.

Q. And then 21 moves north into Lamar County; is that right?

A. Yes, sir.

Q. And 5 moves west into Fayette County?

A. Yes, sir.

Q. What happened with Senate District 6?

A. Senate District 6 moved north into Lauderdale County –

Q. And Senate District 1 –

A. – and a portion of Lawrence.

Q. And then Senate District 1 moves along –

A. Moved east along the top of the map into Limestone and also into a little bit of – portion of Madison.

Q. Let's look at what's been marked as Exhibit 469. Can you tell me what this is.

A. That would be a blow-up of the senate districts that I was given by Senator Dial, who told me that Senator Smitherman had [3-127] given him that map of the three majority African American senate districts in Jefferson County.

Q. And did you try to put Senator Smitherman's map into the Senate plan?

A. I did. I think I – I mean percentages are hard to use, but I put, you know, 95, 97 percent of it into the Senate map.

Q. What part of the – of Senator Smitherman – did you change any of the internal boundaries in Senator Smitherman's map?

A. If I did, it was unintentional. I tried to follow those lines entirely. And I got no feedback that I was wrong, so I think I did those correctly as that map represents.

Q. And what changes did you make in Senator Smitherman's map?

A. The biggest visible change is these few precincts to your left sticking out this way were precincts that were in Senator Reed's Senate District, Senate District 5, I believe, and he wanted to keep those like two or three precincts. In exchange for that, obviously, I had to have equal population, put in

two or three precincts at the very southern tip of Jefferson County.

Q. And were those precincts the Rock Creek Church Road –

A. They were.

Q. – in this area and Rock Creek Church Road to what would be the west?

A. Yes, sir.

Q. And are those precincts majority white or majority black?

A. Majority white.

[3-128] Q. And the precincts to the south that you added to Senator Smitherman's district, are they majority white or black?

A. Majority white.

* * *

[3-130] Q. And then Senator Ross's district, did it keep the core of his old district?

A. It did. Although geographically that looks like a large area, which it is geographically, but populationwise, it's not that large. But, yes, he kept the bulk of his core district and then added some precincts in the city of Montgomery to get back to ideal population.

Q. Now, when you created the land bridge and took population from the south part of Montgomery

County, was that population white and black – white or black?

A. It was probably about 65 percent white.

Q. And in the course of repopulating Senator Ross's district, did you put white folks and black folks back in the district?

A. I did.

Q. And they came in from other parts of the new district; is that right?

A. Yes. Came in from other parts of 25 in the city.

Q. Let's go to tab eight. And what I'll represent to you is this is the southwest Alabama Senate districts.

A. Yes, sir.

Q. And as you look at the old districts, what constraints – Senate District 33 is a black majority district. That's the district of Senator Figures. Were there any constraints on what you could do with her district in repopulating it?

[3-131] A. Well, there were some constraints. One, we didn't want to cross the bay into Baldwin County, so we couldn't really go east. The two senators – the senator who represents District 34, Senator Glover, lives essentially north – well, sort of northwest of 33, and the senator who represents District 35 at that time, Senator Brooks, lives southwest of 33, so

going west was somewhat problematic in terms of going into their neighborhoods. And going north could have had the unintended consequence of cutting off the transportation, shall we say, from District 22 to Escambia County, so that was somewhat problematic. So going south was essentially the easiest course.

Q. Let's look at the new district. And –

A. New District 33?

Q. Well, new districts in this area. What changes did you make to District 35? That would be Senator Brooks' district, former district.

A. District 35, I believe, picked up some of the western part of Mobile County and lost some of its northern – northeastern part to Senate District 33.

Q. And then what effect did the change in Senate District 35 have on Senate District 34?

A. Pushed it a little further north; took up a little bit further north part of the county.

Q. Now, when you talked about the transportation or the land bridge, is that the kind of green between Washington County and [3-132] Baldwin County in District 22?

A. Yes, sir.

Q. Now, with respect to 22, Senator Sanders and Senator Singleton had pushed it south, and Senator – the Mobile districts moved it up out of Mobile

largely. Where did you get the additional population for Senate 22?

A. The additional population for Senate 22 came from northern Baldwin County.

Q. And was that area – was Senate District 34 – 32 overpopulated?

A. Yes, sir.

Q. I'd like to direct your attention now to the House plan. One of the issues that's come up is the movement of House District 53 from Jefferson County to Madison County. Did you recommend that move?

A. I did.

Q. And as far as whether that move was made or not, was that your call, or whose call would that have been?

A. Well, ultimately it was the Legislature's, but initially it was Representative McClendon's.

Q. And why did you make that recommendation?

A. Because every one of the minority majority districts in Jefferson County were underpopulated, some quite dramatically. And when we looked at it as a whole, they were around 70,000 folks short of ideal, those districts added together, which is [3-133] basically a district and a half. And looking at the map, I knew that most of the – if not all of the minority neighborhoods were already included in those

districts. So trying to repopulate them to get them back to deviation was going to retrogress most if not all of them, some of them maybe to the point where I was very concerned about Section 5 preclearance of the plan.

* * *

Q. And as a general matter, how did the black majority Senate [3-134] districts and black majority House districts in Jefferson County correspond? Do they occupy similar space?

A. They do.

Q. With respect to moving House District 73 to Shelby County, was that your recommendation?

A. It was, and it was also a feature of the map that Representative McClammy had given Representative McClendon to give to me.

Q. Why move – why move a district to Shelby County, a House district?

A. Well, two reasons. One, we needed population to repopulate the three majority black districts in Montgomery County, and the only – or most of the only logical population was in 73. Obviously, why move it to Shelby County? That was the fastest growing county in the state, I believe. And it also – every district whole or part that was in Shelby County was overpopulated, so something was going to need to take – one district there, I think, was dramatically overpopulated. House District, I think, 41. So it made

sense to move that district to a much faster growing area.

Q. And you talked about the McClammy map. Are you familiar with the concept of the package that Mr. McClammy gave Mr. McClendon?

A. I am.

Q. And what was the nature of that concept?

[3-135] A. It was a map, a couple of maps, and then corresponding demographic information.

Q. And did that demographic information include House District 73?

A. It did not. He drew the districts inside Montgomery County without a District 73.

Q. Did you use that concept in drawing the districts in Montgomery County?

A. I did. Obviously, it wasn't identical, because I also had to bring in House District 69, which is another majority African American House district that was short of population, so that changed the nature of it slightly, somewhat. But I tried to use the concept of using District 73 to repopulate the minority districts in Montgomery County.

* * *

[3-136] Q. You come up with a plan. What involvement did you have with the plan after it was produced and in the hands of Mr. McClendon and Senator Dial?

A. I was here during the session, and when there were changes that were made to the map, I would – I didn't do all of them, but I sat down with some of the legislators who had changes that they wanted made and remade them.

Q. Like who did you sit down with?

A. I sat down with Oliver Robinson; Patricia Todd; Mary Moore was on the phone with Oliver Robinson when I did that. I may have sat down with Marcel Black and a couple of changes that were made in that area.

Q. And Mr. Robinson and Mary Moore and Patricia Todd, are they all representatives from Birmingham?

A. Yes, sir.

Q. And what about Mr. Black and the folks there? Where are they from?

A. Those were changes in Lauderdale and Colbert County.

[3-137] Q. And is Mr. Black a Republican or Democrat?

A. Democrat.

Q. How about Mr. Robinson, Ms. Moore, and Ms. Todd?

A. Democrats.

Q. Can you think of anybody else you worked – helped work with?

A. Well, I made a few changes, again, to the map because I had had a couple of people who were outside their district because I had the wrong address. Or in one case, my computer program, Maptitude, put it in a different place than the state's computer program. So to be sure, I went back and made some minor corrections to make sure everybody had their own district to the extent possible.

JUDGE PRYOR: Do you know the race of those legislators with whom you made those changes in Birmingham and then the Lauderdale and Colbert counties?

THE WITNESS: Yes, I do. Oliver Robinson and Mary Moore are African American, and Patricia Todd and Marcel Black are white.

Q. And in the course of your work, to the extent you got input from legislators or from legislators through Senator Dial or Representative McClendon, do you think you carried out the wishes of those legislators?

A. Well, as you well know, no one gets everything they want in redistricting. But to the extent possible, I tried to, yes.

* * *

[3-138] MR. BLACKSHER: It's going to take longer for me to move this than it is for the examination, but let me do it.

APX 75 is Mr. Hinaman's deposition, and I move its admission.

MR. PARK: No objection, Your Honor.

JUDGE PRYOR: It's admitted.

MR. BLACKSHER: APX 68 is Mr. Hinaman's declaration, and I move its admission.

MR. PARK: No objection, Your Honor.

JUDGE PRYOR: It's admitted.

* * *

CROSS-EXAMINATION

BY MR. BLACKSHER:

Q. To be clear, Mr. Hinaman, your instructions were to pursue two goals: One, not to retrogress the size of the black [3-139] majorities in the majority black districts, and two, to the – I think you said to the extent possible, to comply with the wishes of incumbents with whom you met; is that correct?

A. That's correct. There were more goals than that, obviously. To stay within deviation and –

Q. Plus or minus 1 percent?

A. Yes. And comply to the extent possible with the guidelines set forth by the reapportionment committee.

Q. But as you said in your deposition, to the extent that the guidelines called for trying to preserve county boundaries, that was subordinated to these other goals; isn't that correct?

A. Certainly to one person, one vote. Yes, sir.

* * *

[3-142] Let me ask you this. When you were attempting to bring all majority black districts up to the size of the black majorities with 2010 census on top of 2001 plan – and you were reaching out to find black precincts, right?

A. Yes, sir.

Q. I did not ask you in your deposition this question, so let me ask it now. When you were trying to make – get the black population you needed, did that mean that you could only pick up a precinct that was majority black, or was there some cut point where you decided the precinct would not serve your purpose?

A. I'm assuming you're not referring to this map anymore, and you're talking about –

[3-143] Q. No. I'm not referring to this map anymore.

A. No. When I was adding population to majority black districts, my goal was not to retrogress the number that they had in 2001, meaning 2010 census, as applied to the 2001 lines. And in toto, whatever I added to a various district, I would look to see what change that made to the overall black percentage in that district. And so in some districts I could add in anything I wanted, and it didn't matter because they were – you know, either they didn't need that much population, or the changes I added didn't matter. But, yes, where it was something that I was concerned about retrogressing, I did look at the nature of the precincts I was adding, certainly.

Q. Yes. So, I mean, and we had an earlier demonstration. Bill Cooper showed how the Maptitude works. When you're doing it, as you take a precinct and add it, let's say, to – the majority black district we're talking about here is Senator Sanders' SD 23. Okay? And as you put a precinct into SD 23 with Maptitude, it pops up – you look at the table and see how much that's increased the black percentage. Right?

A. Correct. Yes, sir.

Q. And if that precinct did not increase the black percentage, or at least it didn't increase it as much as you wanted, you would simply split the precinct and go down to the block level and look for a majority black block or several blocks.

A. Well, that's a little bit of a simplification. I mean, I [3-144] tried to look at the additions en

masse, not just a precinct. I may add a white precinct, a majority white precinct and a majority African American precinct; but if you look at the end number, if it did not retrogress the overall end number for that precinct, then they were added in. If for some reason they retrogressed that number, then, yes. So I would split precincts.

Q. And when you split precincts, you would have to go to the block level?

A. Yes, sir.

* * *

[3-145] JUDGE THOMPSON: Let me ask you this. How do you define retrogression?

THE WITNESS: I define it, in terms of my work, in two ways: One, not lowering the overall total number of majority African American districts in either plan. Actually, we added one in the House plan. The number stayed the same in the Senate plan. And then looking at 2010 census as applied to 2001 lines, [3-146] whatever that number was, I tried to be as close to that as possible. And if I was significantly below that, I was concerned about that being retrogression that would be looked upon unfavorably by the Justice Department under Section 5.

Q. And you've had experience dealing with the Justice Department in preclearance proceedings in other cases?

A. I've drawn plans that were precleared. Yes, sir.

* * *

CROSS-EXAMINATION

BY MR. TANNER:

* * *

[3-149] Q. Did you – were you aware of any related studies, for example, about variations among the state's black communities in terms of voting or anything else?

A. Well, "anything else" covers a lot of subjects, but I was –

Q. I'll be more specific. How about socioeconomic characteristics such as income, type of employment, educational level achieved?

[3-150] A. I did not look at those factors.

Q. Attitudes?

A. No, sir.

Q. Did you obtain or already have any information about the black population, variations in the black population in various areas such as Birmingham and Mobile, any differences?

A. Differences in terms of?

Q. Of any of the characteristics I've mentioned: Either voting or education, employment, types of employment.

A. No, sir.

* * *

[3-164] A. No. I don't believe – I tried to draw those districts as close to the numbers as possible and practicable as they were in the 2001 plan to avoid problems with potential Section 5 preclearance.

* * *

[3-173] Q. And Talladega County was intact. And so you substantially reconfigured both districts, changing the core or changing the configuration of both districts fairly dramatically.

A. Well, I wouldn't say the core, but it changed the configuration of both districts.

Q. Both districts dramatically. And you know from campaigning around the state that there's a lot of difference between Talladega County and Shelby County.

A. Yes, sir.

Q. And the – basically, it moved a black majority population out of Talladega County in Senate District 11 and put it in [3-174] rapidly growing, heavily white Shelby County. Correct?

A. Or put it into Senate District 15.

Q. Yes. To Senate District 15 with the Shelby County voters, the Shelby County dominated district.

* * *

[3-180] Q. Well, didn't your data from the Obama election give strong indication of that?

A. I didn't specifically look at it, but I'm sure it would have.

Q. But didn't even look how your black majority districts had performed in any election?

[3-181] A. I was more concerned in drawing minority districts as to whether I was retrogressing the overall population, black percentage, than voter results.

Q. So you only looked at the voter results of the Obama race and the lieutenant governor's race when you were looking at the white districts.

A. Well, "only" is a dangerous word, but that was not primarily what I was looking at when I was drawing the minority districts. You're correct.

* * *

[3-182] Q. But I believe you indicated that you did not examine that issue; that is, whether it was necessary – how these districts performed in the Obama election, for example.

A. That's correct. I looked more at the overall number and whether I was retrogressing the total black population in those districts.

[3-183] Q. And by the overall number, you mean –

A. Total population.

Q. – total population black?

A. Yes, sir.

Q. And by retrogressing, you mean lowering that percentage?

A. Yes, sir.

* * *

[3-186] identical numbers that they were 10 years ago.

Q. The identical?

[3-187] A. By total black percentage.

* * *

[3-191] TOM BRUNELL

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PARK:

* * *

[3-197] Q. Can you tell us why you favor one person, one vote over other considerations?

A. Some of the other – I mean I just – you know, kind of trying to think of them as in some sort of hierarchy, I think a lot of the other ones – for instance, like communities of interest – for me come at a much lower level than one person, one vote.

One person, one vote is sort of where we started in the 1960's. This is what got the courts involved in redistricting, and I think the underlying notion of equal voting power is critical. I think it makes perfect sense, and it's something that we should put ahead of some of these other things like a community of interest.

I mean, I've heard – I mean, anything can be a community of [3-198] interest. Right? I mean, so at some level, the notion has lost any worth at all. I've heard – I was involved in a Texas case where a lawyer was saying, well, our communities of interest are what the districts looked like in the 1950's. So at that point, for me, the notion of a community of interest, once anything can be a community of interest, well, I'm no longer interested in that because it has no value at all to anybody involved.

So communities of interest, for instance, I think are less important. Compactness is less important than one person, one vote. Protecting artificial lines like municipal lines or county lines is less important than equalizing voting power, in my opinion. I'm sure some people disagree with me.

For me, those – I think that those things come at a secondary level or even a tertiary level relative to equalizing voting power of residents; of citizens.

Q. The 2001 and previous plans used plus or minus 5, and these plans use plus or minus 1 as far as overall deviations. Which do you prefer?

A. I prefer no deviations, but I vastly prefer a plus or minus 1 deviation over plus or minus 5.

Q. Why do you prefer the smaller deviation to the larger?

A. *The only* – any deviation that we pick is necessarily arbitrary. Right? One percent is arbitrary. Five percent is arbitrary. You know, 2.2968 is arbitrary. Whatever we pick is arbitrary. You get back to, why 5? Why not 5.5? Well – you [3-199] know. So drawing these arbitrary bright lines is very, very difficult, whereas if we have zero population deviations, that's immediately defensible and obvious to everyone.

So that's one of the major reasons I prefer it. But then also because I favor equalizing voting power across – you know, across the state, across districts within the state, for all the citizens.

Q. Is a smaller deviation related in some way to the ability to generate a political gerrymander?

A. Yes. Yeah, that's another key reason, is that this was kind of a very simple tool that we've kind of handed over to map makers to fiddle with, to use for partisan purposes. Right?

And the Court talked about it earlier. Right? I mean, if you're gerrymandering, you are underpopulating your own districts, right, because you want to use your population more efficiently and overpopulate the opposition's districts.

Q. And the larger deviation allows you to do that.

A. Yeah. That's right.

Q. Now, are you saying that a zero deviation plan can never be politically gerrymandered?

A. No. You could still gerrymander a zero deviation plan. But it is one tool that we can take away. Right? This is just like a wrench in the toolbox. Get rid of that wrench, and then we can strain the map makers in very useful ways.

* * *

[3-219] JAMES H. MCCLENDON

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PARK:

Q. Would you please state your name for the record.

A. James H. McClendon.

Q. And are you a member of the Alabama Legislature?

A. Yes, sir, I am.

* * *

[3-220] Q. Were you member of the reapportionment committee?

A. Yes, sir.

Q. How did you become a member of the reapportionment committee?

A. Appointed by the speaker.

Q. And were you appointed to represent a particular district, or were you appointed at large?

A. I believe I was an at-large member.

Q. And how were you – were you selected as chair, cochair of the committee?

A. I was selected as House chair, which made me – that would be chair of the House Reapportionment Committee, which made me cochair of the joint committee. That was done by an election of the committee members.

Q. You've been in the courtroom throughout the trial, and you've heard the testimony about the adoption of the guidelines. What's your view about the appropriateness of using [3-221] plus, minus 1 percent as the overall deviation?

A. Well, just makes good sense to me. If you're interested in one person, one vote, that's a lot closer than 5 percent, or actually, plus or minus 5, which gives you 10 percent deviation. You know, we had already gone through this with the congressional, which has zero percent, and state board of education

with 1 percent. And we went right through with DOJ preclearance, so I didn't have a problem at all with 1 percent. It made sense to me.

Q. And you've heard testimony about the Voting Rights Act. What was your understanding of what the state wanted to do with respect to Section 5 and its obligations under Section 5?

A. On the Voting Rights Act – are we talking about retrogression now?

Q. Yes, sir.

A. Well, my understanding of retrogression is that a district or – an individual or district is retrogressed if the minorities in that district, whether by race or language, are worse off after redistricting than they were before redistricting. And of course, we don't have any minorities by language, so it's a racial thing.

Q. And was the goal of the redistricting effort to get the approval of the Department of Justice?

A. Yes, sir. We knew that we were going to be subject to preclearance by DOJ, and we knew that was a major hurdle.

[3-222] Q. Did you know exactly what DOJ looked for when it reviewed plans?

A. Well, when it came to retrogression and talking about percentages, to the best of my knowledge, there wasn't any hard numbers. There were relative numbers, but there were not any hard numbers.

There was nothing that said 50 plus – 50 percent plus one is okay. In fact, my impression was that was not the case. So really, what we targeted was we tried to look at the 2010 census, overlay it on the districts, and try not to change the percentages of the citizens, the black citizens, in a district any more than we had to. Tried to keep them in about the same proportion as they were.

* * *

[3-223] Q. And you heard testimony from Senator Dial that he offered to meet – or that he met with every one of his 34 colleagues to talk about the new districts. What kind of offer – or what did you do about meeting with your colleagues?

A. I made the offer to all 104 members of the House to come sit down and either work with Mr. Hinaman or myself. As far as the Democrats, I went to Representative McCampbell, who is minority chair, I guess, of the House caucus, black caucus. I spoke to him personally on the House floor. Informed him that I was available. I did the same thing with Representative Craig Ford, who was minority chair for the Democratic caucus in the House. I offered that to them. I gave them a phone number to call and [3-224] set up a time with the lady that worked with me up in my office, and we set up schedules. Did the same thing with the Republican members in my caucus. So I made the offer to every House member. Not every House member came.

Q. And Mr. Hinaman testified that he met with Republicans. Did you meet with any of the Democrats?

A. I met with all of them that wanted to meet. I made myself available to them.

* * *

[3-225] Q. Okay. Let me direct your attention to State DMC 001517 of Exhibit 459. Can you tell us what this is?

A. Well, that's pretty typical of what I did. In this case, we had – I wish I knew who 98 is. I'm looking at the bottom, and I can't read that signature. But there was someone who wanted – this was discussing how to put these districts together, and there were common lines in there. And this was a pretty good example. I believe this involved people from two different parties that sat down and worked out how they wanted to work out a common line. And as long as they could do that without affecting the deviations, I would turn this over to Mr. Hinaman and ask him to do his best to incorporate it into what he had in his computer. But this is pretty typical of the way I went about doing this. And in this case, we had both of [3-226] them initial it.

Q. And the two districts that are involved are House Districts 102 and 98; is that right?

A. That's –

Q. Does that appear to be?

A. Correct.

Q. Let me show you what has been marked as 480, the 2001 House plan, and direct your attention to Mobile. Is that what we're talking about, District 98 and the contiguous district to its north, District 102?

A. That would have to be.

Q. And does the note on 1517 read: Please move from HD 98 to HD 102. This move has been approved by Rep. C. Fincher and Rep. N. Bracy.

A. Yes.

Q. Those two.

A. Fincher is Republican, Bracy is the Democrat, and they just got together and worked out something. That's what they wanted to do.

Q. And is Fincher a white Republican?

A. Yes, sir, he is.

Q. And Bracy is a black Democrat?

A. That is correct.

* * *

[3-229] Q. Let me go back a step or so. Did you get anything from Mr. McClammy with respect to the Montgomery area House districts?

A. Oh, yes, sir, I certainly did.

Q. What did you get from Mr. McClammy?

A. He brought a really nice map. And it was a big map. It wasn't one of these small, you know, letter size maps. It was a big map. And I took a look at that map, and he said that he had had – he and the other – I believe the other black legislators [3-230] in Montgomery County had agreed upon this and thought it was a good plan. And so I turned that over to Mr. Hinaman and asked that he see what he could do to work it into the Montgomery area for representation.

Q. What did Mr. McClammy tell you about using that plan or any other?

A. You know, he mentioned another group, minority, black folks, that had maybe had some maps, and he suggested that his map would be a better map.

* * *

[3-234] Q. In adopting the overall deviation of plus/minus 1, did you have any intention of discriminating against the African American voters of Alabama?

[3-235] A. Absolutely not.

Q. And in putting together the House plan, did you have any intent to discriminate against the African American voters?

A. I did not.

* * *

[3-246] CROSS-EXAMINATION

BY MR. TANNER:

* * *

[3-257] Q. And in terms of Voting Rights Act, I believe the testimony is that the state Legislature focused solely on the black percentage in terms of the majority black districts in terms of drawing those districts.

A. I would agree with that statement.

* * *

APX 6

Redistricting Population Comparison
Alabama State House – 2002 Plan Compared to Act 2012-602 Plan (2010 Census)

2002 Plan					Act 2012-602 Plan				
District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black	District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black
001	47247	8627	18.26%	16.45%	1	45968	7143	15.5%	14.06%
002	45462	1067	2.35%	2.10%	2	45486	1919	4.2%	3.92%
003	42348	8277	19.55%	18.28%	3	45972	11136	24.2%	22.92%
004	51181	5074	9.91%	9.63%	4	45083	5959	13.2%	12.23%
005	48495	4992	10.29%	9.82%	5	45403	5846	12.9%	12.37%
006	57674	17734	30.75%	29.93%	6	45796	7731	16.9%	16.97%
007	40956	4072	9.94%	9.79%	7	45089	1855	4.1%	3.97%
008	42351	11316	26.72%	24.03%	8	45083	9248	20.5%	18.58%
009	45371	1195	2.63%	2.39%	9	45083	964	2.1%	1.87%
010	50267	8341	16.59%	15.28%	10	45110	7468	16.6%	15.26%
011	44104	247	0.56%	0.38%	11	45282	334	0.7%	0.47%
012	45798	783	1.71%	1.57%	12	45070	726	1.6%	1.51%
013	39882	2951	7.40%	6.66%	13	45070	2978	6.6%	5.96%
014	40597	1571	3.87%	3.40%	14	45073	1305	2.9%	2.45%
015	48965	7848	16.03%	14.88%	15	45893	6387	13.9%	12.36%
016	40993	4542	11.08%	10.42%	16	45080	4803	10.7%	10.95%
017	42595	1364	3.20%	3.03%	17	45082	2026	4.5%	4.15%
018	43784	2066	4.72%	4.55%	18	45585	2618	5.7%	5.59%
019	42380	29685	70.04%	67.70%	19	45081	27727	61.5%	60.15%
020	47531	1570	3.30%	3.01%	20	45808	1852	4.0%	3.65%
021	48999	13492	27.54%	24.91%	21	45614	4050	8.9%	8.07%
022	48959	2996	6.12%	5.67%	22	45872	2772	6.0%	5.62%
023	43186	1823	4.22%	3.72%	23	45972	1954	4.3%	3.74%
024	48127	819	1.70%	1.45%	24	45972	791	1.7%	1.46%
025	64950	10726	16.51%	16.41%	25	45709	7490	16.4%	15.90%
026	52448	844	1.61%	1.26%	26	45721	805	1.8%	1.47%
027	47288	934	1.98%	1.67%	27	45827	838	1.8%	1.54%
028	40514	7559	18.66%	17.53%	28	45887	13718	29.9%	28.05%

2002 Plan					Act 2012-602 Plan				
District	Population	NH DOJ	% NH	% NH DOJ	District	Population	NH DOJ	% NH	% NH DOJ

		Black	DOJ Black	18+ Black			Black	DOJ Black	18+ Black
029	43353	7730	17.83%	16.75%	29	45910	1762	3.8%	3.11%
030	44979	1910	4.25%	3.66%	30	45216	2106	4.7%	4.07%
031	46434	9880	21.28%	20.08%	31	45842	7379	16.1%	15.23%
032	38800	23133	59.62%	56.97%	32	45504	27450	60.3%	57.68%
033	43809	10601	24.20%	22.27%	33	45905	9925	21.6%	19.87%
034	50560	786	1.55%	1.35%	34	45386	852	1.9%	1.62%
035	44612	7039	15.78%	14.46%	35	45957	7571	16.5%	15.18%
036	46065	6613	14.36%	12.80%	36	45957	5788	12.6%	11.28%
037	43958	9357	21.29%	19.94%	37	45966	13623	29.6%	28.07%
038	44337	13409	30.24%	28.80%	38	45968	8390	18.3%	17.13%
039	46905	2164	4.61%	4.21%	39	45968	2584	5.6%	5.08%
040	49653	5895	11.87%	11.62%	40	45932	6246	13.6%	13.19%
041	73181	8191	11.19%	10.60%	41	45092	5561	12.3%	11.63%
042	48338	5639	11.67%	10.80%	42	45966	5149	11.2%	10.41%
043	56056	4185	7.47%	7.02%	43	45209	3052	6.8%	6.48%
044	48707	14447	29.66%	25.54%	44	45088	5278	11.7%	9.87%
045	42890	15444	36.01%	31.72%	45	45087	6983	15.5%	14.03%
046	50398	4592	9.11%	8.43%	46	45316	3498	7.7%	7.17%
047	48011	7898	16.45%	14.65%	47	45578	9273	20.3%	17.77%
048	54047	4750	8.79%	8.17%	48	45592	2644	5.8%	5.85%
049	52014	6385	12.28%	11.59%	49	45877	6069	13.2%	12.60%
050	55378	5507	9.94%	9.77%	50	45961	3981	8.7%	8.60%
051	48552	6406	13.19%	10.98%	51	45073	2762	6.1%	5.33%
052	43159	25934	60.09%	58.52%	52	45083	27077	60.1%	57.21%
053	35378	19708	55.71%	52.49%	53	45106	25372	56.2%	52.88%
054	34905	19817	56.77%	53.37%	54	45070	25651	56.9%	52.50%
055	35572	26159	73.54%	71.22%	55	45071	33153	73.6%	70.60%
056	41064	25566	62.26%	59.42%	56	45071	28069	62.3%	59.71%
057	36199	24792	68.49%	66.52%	57	45071	30890	68.5%	65.98%
058	37443	29238	78.08%	74.02%	58	45088	32903	73.0%	67.99%
059	32838	22013	67.04%	64.25%	59	45218	34739	76.8%	74.28%
060	36704	24822	67.63%	65.15%	60	45084	30594	67.9%	65.68%

		2002 Plan					Act 2012-602 Plan		
District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black	District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black

061	41422	12668	30.58%	27.95%	61	45078	8601	19.1%	17.48%
062	55022	12961	23.56%	21.95%	62	45840	7250	15.8%	14.40%
063	59073	14172	23.99%	20.87%	63	45251	6146	13.6%	12.49%
064	40427	10471	25.90%	25.47%	64	45972	6679	14.5%	13.45%
065	38681	10439	26.99%	25.71%	65	45073	10851	24.1%	23.08%
066	40491	11154	27.55%	25.57%	66	45971	11666	25.4%	24.54%
067	37878	26188	69.14%	65.59%	67	45078	31189	69.2%	65.73%
068	36234	22646	62.50%	59.97%	68	45069	29109	64.6%	61.82%
069	37572	24087	64.11%	61.99%	69	45477	29188	64.2%	61.83%
070	39253	24295	61.89%	56.31%	70	45970	28607	62.2%	57.13%
071	38094	24485	64.28%	62.04%	71	45348	30334	66.9%	64.42%
072	39414	23696	60.12%	57.52%	72	45346	29265	64.5%	61.88%
073	48266	23431	48.55%	45.46%	73	45936	4819	10.5%	9.77%
074	41047	12539	30.55%	26.57%	74	45646	11280	24.7%	22.23%
075	60140	16759	27.87%	26.91%	75	45946	12224	26.6%	27.12%
076	44894	31229	69.56%	67.48%	76	45872	33962	73.9%	71.24%
077	34998	25753	73.58%	71.48%	77	45954	30812	67.0%	64.20%
078	30880	22955	74.34%	72.57%	78	45957	32246	70.2%	67.43%
079	52950	7588	14.33%	13.38%	79	45972	5450	11.9%	11.09%
080	54900	13051	23.77%	21.48%	80	45964	8084	17.6%	15.69%
081	43803	11588	26.45%	24.44%	81	45932	9214	20.1%	18.32%
082	43389	24808	57.18%	54.19%	82	45858	28504	62.2%	60.48%
083	41039	23404	57.03%	55.51%	83	45973	26523	57.7%	55.53%
084	41317	20934	50.67%	49.23%	84	45969	24068	52.4%	50.99%
085	42429	20523	48.37%	45.84%	85	45229	22847	50.5%	47.22%
086	49071	8357	17.03%	14.81%	86	45965	6347	13.8%	12.35%
087	46299	4317	9.32%	8.65%	87	45961	4252	9.3%	8.55%
088	56499	9520	16.85%	15.51%	88	45966	8536	18.6%	16.93%
089	44249	14490	32.75%	31.07%	89	45678	14732	32.3%	30.61%
090	39991	14302	35.76%	33.64%	90	45812	15994	34.9%	32.91%
091	49948	8523	17.06%	16.05%	91	45070	7243	16.1%	15.03%
092	40506	5434	13.42%	11.93%	92	45101	5892	13.1%	11.65%

	2002 Plan					Act 2012-602 Plan			
District	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**	**District**	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**
093	46741	8611	18.42%	16.24%	93	45956	8120	17.7%	15.66%
094	59763	4389	7.34%	6.68%	94	45965	3900	8.5%	7.52%

095	61642	3685	5.98%	4.92%	95	45971	2409	5.2%	4.24%
096	50198	6345	12.64%	11.62%	96	45970	4819	10.5%	10.06%
097	35406	21502	60.73%	57.35%	97	45071	27388	60.8%	56.73%
098	37831	24676	65.23%	62.38%	98	45069	27044	60.0%	57.96%
099	39791	29225	73.45%	70.09%	99	45069	29617	65.7%	62.07%
100	55488	7883	14.21%	12.78%	100	45069	6865	15.2%	13.64%
101	42749	10726	25.09%	22.28%	101	45089	7765	17.2%	15.76%
102	50860	6236	12.26%	11.62%	102	45071	3654	8.1%	7.53%
103	40611	28386	69.90%	64.83%	103	45075	29443	65.3%	60.18%
104	47450	7421	15.64%	13.97%	104	45072	7279	16.1%	13.98%
105	44279	4910	11.09%	9.82%	105	45072	4251	9.4%	8.61%
Total	**4,779,736**	**1,263,285**	**26.43%**	**24.85%**	**Total**	**4,779,736**	**1,263,285**	**26.43%**	**24.85%**
Total of 26 Majority BVAP Districts	**991,726**	**648,200**	**65.36%**	**62.40%**	**Total of 27 Majority BVAP Districts**	**1,224,702**	**790,924**	**64.58%**	**61.58%**
Total of 6 Influence Districts (31.07 to 49.23% BVAP)	**259,142**	**109,124**	**42.11%**	**39.52%**	**Total of 3 Influence Districts (30.61 to 47.22% BVAP)**	**136,719**	**53,573**	**39.18%**	**36.76%**
Difference in Black Pop in Majority Black Districts (2002 v. ACT 2012_602 Plan)				**-142,724**					
Difference in Black Pop in Influence Districts (2002 v. ACT 2012_602 Plan)				**55,551**					

APX 7

Redistricting Population Comparison
Alabama State Senate – 2002 Plan Compared to Act 2012-603 Plan (2010 Census)

2002 Plan					Act 2012-603 Plan				
District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black	District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black
001	135057	17971	13.31%	12.26%	1	136648	15504	11.35%	10.72%
002	179058	34672	19.36%	19.10%	2	137922	34063	24.70%	24.35%
003	151168	21148	13.99%	12.80%	3	137642	19445	14.13%	12.98%
004	123291	4975	4.04%	3.89%	4	135214	2595	1.92%	1.75%
005	134976	13569	10.05%	9.20%	5	135415	9066	6.69%	6.38%
006	117045	7234	6.18%	5.88%	6	136009	21129	15.54%	14.67%
007	148905	48386	32.49%	30.88%	7	137911	38169	27.68%	26.12%
008	142128	4540	3.19%	2.90%	8	137920	4960	3.60%	3.22%
009	144554	3219	2.23%	1.87%	9	137921	2460	1.78%	1.44%
010	125075	17247	13.79%	12.65%	10	137323	17399	12.67%	11.69%
011	125111	42844	34.24%	32.30%	11	136114	20828	15.30%	14.40%
012	142431	17755	12.47%	11.52%	12	135258	27686	20.47%	19.03%
013	132777	27437	20.66%	19.56%	13	137883	28967	21.01%	19.88%
014	168669	20687	12.26%	11.36%	14	136210	19533	14.34%	13.76%
015	160461	20844	12.99%	11.76%	15	136868	20108	14.69%	14.38%
016	149527	17230	11.52%	10.47%	16	137160	16465	12.00%	10.86%
017	157178	13224	8.41%	7.49%	17	135227	7525	5.56%	4.93%
017	112472	67410	59.93%	57.31%	18	135258	79971	59.12%	56.43%
019	109165	78214	71.65%	69.31%	19	135218	88419	65.39%	62.68%
020	107375	83713	77.96%	74.44%	20	135211	65699	63.38%	59.03%
021	140682	35581	25.29%	22.81%	21	135621	21337	15.73%	14.34%
022	137373	39126	28.48%	27.48%	22	137108	29821	21.75%	20.70%
023	111939	72521	64.79%	61.87%	23	135338	87706	64.81%	61.67%
024	118832	74662	62.82%	59.38%	24	137724	87175	63.30%	59.74%
025	157932	45466	28.79%	26.65%	25	135492	31191	23.02%	21.74%
026	120666	87785	72.75%	70.87%	26	136451	102641	75.22%	72.70%
027	139166	35474	25.49%	22.90%	27	137918	29517	21.40%	19.50%

2002 Plan					Act 2012-603 Plan				
District	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**	**District**	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**
028	131368	67061	51.05%	49.82%	28	137909	82686	59.96%	58.03%
029	136679	21062	15.41%	13.65%	29	137921	21329	15.46%	13.81%
030	139399	40991	29.41%	28.15%	30	135374	30070	22.21%	21.33%
031	129622	31542	24.33%	22.44%	31	137917	27190	19.71%	18.45%
032	155619	9815	6.31%	5.47%	32	137918	11209	8.13%	7.35%
033	111915	72622	64.89%	61.55%	33	136214	97679	71.71%	68.10%
034	155435	20794	13.38%	12.20%	34	135267	17435	12.89%	11.68%
035	126686	46474	36.68%	32.67%	35	135232	26308	19.45%	17.27%
Total	**4,779,736**	**1,263,285**	**26.43%**	**24.85%**		**4,779,736**	**1,263,285**	**26.43%**	**24.85%**
Total of 7 Majority BVAP Districts	**792,364**	**536,917**	**67.76%**	**64.77%**	**Total of 8 Majority BVAP Districts**	**1,089,323**	**711,976**	**65.36%**	**62.21%**
Total of 4 Influence Districts (30.88% to 49.8% BVAP)	**532,070**	**204,765**	**38.48%**	**36.36%**	**Zero Influence Districts**	**0**	**0**	**0.0%**	**0.0%**
Difference in Black Pop in Majority Black Districts (2002 v. ACT 2012_603 Plan)				**-175,059**					
Difference in Black Pop in Influence Districts (2002 v. ACT 2012_603 Plan)				**204,765**					

DECLARATION OF RANDY HINAMAN

1. My name is Randy Hinaman. I am over the age of 21 years, have personal knowledge of the facts set forth, and am competent to testify regarding them.

* * *

4. In drawing the lines for all the new districts, I used information conveyed to me by Senator Dial, Representative McClendon, and individual legislators to try to make sure we accommodated the legislators' wishes to the extent possible. I did make recommendations, including the recommendations to move HD 53 from Birmingham to Huntsville and to make HD 85 a majority-black district thereby increasing the total number of black-majority districts under the House plan to 28, but the decision to follow those recommendations was made by Representative McClendon, not by me.

5. Senator Dial gave me a map of the Birmingham-area black majority Senate districts (SDs 18, 19, and 20) that I understood came from Senator Rodger Smitherman. That map did not include any demographic information with it, but when I looked at the neighborhoods included in the new district boundaries, I saw that the black population in the proposed new districts was about the same percentage as in the old districts. That map also split a number of precincts, which I input into the draft Senate plan as they came to me. I estimate that I used 90-95% of that map in drawing the lines for the Senate plan, with the changes coming around the edges of the

districts. The decision to follow these recommendations was made by Senator Dial.

* * *

10. As I have previously noted, that black-majority districts in the Alabama Senate plan were each under-populated coming into the 2012 redistricting effort. This was particularly true of SDs 23 and 24, which are located in the rural west-central part of the State south of Tuscaloosa and north of Mobile. SD 24 borders on Mississippi. SD 23 was 24,625 people (-18.03%) short of an ideal Senate district, and SD 24 was 17,732 (-12.98%) short. Both districts needed to add population and to remain reliable black majority districts, and the best place to get the additional population was by pushing south into SD 22 and east into SD 30. That would cause less disruption to other districts than pushing north and east toward Tuscaloosa. This also kept the African-American percentages nearly identical to what they had been. Pushing south had the additional benefit of putting the extra 19,000 people in SD 32 in Baldwin County into a district that met the allowable population deviation. As a result, the changes I proposed included pushing SD 22 further into Baldwin County. Senator Dial made the decision on how to fit these districts into the Senate plan, not me.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, BOBBY SINGLETON, ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS, RED ARMSTEAD, GEORGE BOWMAN, RHONDEL RHONE, ALBERT P. TURNER, JR., AND JOLES WILLIAMS, JR. INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED	)	
Plaintiffs,	)	
v.	)	Civil Action No.
THE STATE OF ALABAMA; BETH CHAPMAN, IN HER OFFICIAL CAPACITY AS ALABAMA SECRETARY OF STATE,	)	2:12-CV-491-WKW-MHT-WHP (3 Judge Court)
Defendants,	)	
DEMETRIUS NEWTON, et al.,	)	
Plaintiffs,	)	Civil Action No.
v.	)	2:12-CV-1081-WKW-MHT-WHP
THE STATE OF ALABAMA, ET AL.	)	

DEPOSITION OF MR. HINAMAN

Q. Okay. Item 3 on PX-6 is goals for each plan. What goals were discussed?

A. That was primarily one of my questions was are we putting members together? Are we making sure we do not put incumbent members of the legislature together? Are there any other goals related to the map?

Q. And the responses you got were?

A. My response I got are please do not – our goal is to not put any members together if possible. Obviously that may not be possible in all cases. As it turned out, it was possible in the Senate map but not in the House.

(Hinaman Dep. 25:3-15)

* * *

Q. Did you go over the guidelines that the Reapportionment Committee had voted for?

A. We did. We talked about those, yes.

Q. And were you given a copy of those?

A. Yes, sir. If I may just add one other thing to your earlier question on the goals? It was also a goal to change each district to some extent the least amount possible but still obviously live within the guidelines of the Reapportionment Committee and the deviation. So, in other words, if Senate District X had these four counties, you know, try to keep it as

close to these four counties as possible, which obviously isn't always possible.

(Hinaman Dep. 25:16 – 26:3)

* * *

Q. But you said that the requirement that contests between incumbent members of Congress, the legislature and the state board will be avoided whenever possible, that was discussed?

A. Yes, sir.

(Hinaman Dep. 29:16-20)

* * *

Q. Paragraph 5, every ESI, which is electronically stored information I think is what it stands for, or database reflecting demographic information as far as voting patterns and so forth. That's what you provided on the thumb drive?

A. Yes, it's part of what's on the thumb drive. Yes, sir.

Q. Are there any other databases that you haven't told me about either that were provided by Maptitude or that you got from the Reapportionment Office or the RNC that you used?

A. No. the only exception to that, which you haven't gotten to that piece of paper, but that's a list of Senators and their addresses.

I also had a list of House members and their addresses, but for some reason I couldn't find it in my computer. But I was given a list of House members and their addresses if you count that as data.

Q. Well, you did have to locate the residences of incumbents on the map at some point, didn't you?

A. Yes, sir.

Q. And you used a GPS function to do that?

A. I was provided that by the Reapportionment Committee. Yes.

(Hinaman Dep. 36:1-24)

* * *

Q. Would it have been possible to put Senator Irons and Senator Bedford in the same district?

A. It would have been and I actually discussed that as a possibility, but both Senator Dial and Pro Tem Marsh told me that they did not want to put two senators in the same district.

(Hinaman Dep. 143:21 – 144:1)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,

Plaintiffs,

vs.

THE STATE OF ALABAMA, et al.,

Defendants.

CIVIL ACTION NO. 2:12-CV-0069-WKW-MHT-WHP

* * * * * * * * * * *

DEMETRIUS NEWTON, et al.,

Plaintiffs,

v.

THE STATE OF ALABAMA, et al.

Defendants.

CIVIL ACTION NO. 2:12-CV-0069-WKW-MHT-WHP

* * * * * * * * * * *

DEPOSITION OF THEODORE S. ARRINGTON
JUNE 28, 2013

* * * * * * * * * * *

THEODORE S. ARRINGTON

The witness, after having first been duly sworn to speak the truth, the whole truth and nothing but the truth testified as follows:

* * *

Q. Can you explain the evidence that supports your conclusion that the legislature acted with discriminatory intent in adopting the 2012 legislative plans?

* * *

A. Now, remember. I don't by any means say that they were the exclusive motive. Obviously partisanship is always the major motive when you're redrawing districts – when legislators are drawing districts. Not when I draw districts or necessarily when courts do. But when legislators draw districts, we all know that partisanship is the most important factor. But in Alabama, partisanship and race are inextricably combined. They can't be separated in a convenient way.

So by acting to prevent the election of white Democrats, even though you're protecting black districts, when you act to prevent the election of white Democrats, you're essentially cutting off the blacks from the ability to form alliances with whites, putting them in a political ghetto, and that's racial discrimination. And that was part and parcel of the intent of the legislature by their own words.

Q. When you talk about the statements of legislators/ you were talking about Senator Beason and Representative Lewis; is that right?

A. I also think comments that have been made/for example/to the media and – that the intent was to eliminate all of the white Democratic districts.

(Arrington Dep. 20:4-7; 21:6-22:10)

Q. Should the Republicans step in between him and himself?

A. Yeah/they should. But they are not going to. I'm not – I'm not naive. I've been involved in politics since 1960. They are not going to do that.

(Arrington Dep. 48:13-49:18)

Q. What do you point out with respect to the process of overall design?

A. The overall design of the plan was in the hands of Mr. Hinaman, and whatever instructions he received from the cochairs, from the president pro temp, and from the lieutenant governor and what he assumed from the nature of the 501C4 who is paying his bills, from the fact that he said specifically that he would only work with Republican legislators and that the cochairs have said specifically that his job was to work with the Republican caucus, period.

So the overall design of the plan comes basically from Mr. Hinaman based on what we know of the partisan nature of his instructions.

Q. And that's partisan. Right? Correct?

A. Yes. Keeping in mind that race and party cannot be disentangled in Alabama. Can't be disentangled anywhere, but it's particularly difficult to disentangle it in the deep South.

Q. How do we know if it's race or politics?

A. Because it is the same. The major way that you know how a precinct has voted in most of Alabama is the percentage of blacks in that precinct. And that will tell you – I'll give you a correlation: Higher than 8, probably higher than 9, but certainly higher than 8 between the percentage black in a precinct and the vote for Democrats in that precinct.

Now, there are some parts of Alabama where there are still substantial numbers of white Democrats. But in most of Alabama, you're down in the 30 percent or so of whites that are voting for the Democrats.

(Arrington Dep. 65:2-66:12)

Q. Okay.

A. Blacks vote overwhelmingly 90 percent or more for Democrats, and everybody in Alabama knows that.

(Arrington Dep. 149:2-5)

TESTIMONY ON RACIALLY POLARIZED VOTING IN ALABAMA AND ITS IMPLICATIONS FOR AFRICAN AMERICAN VOTER OPPORTUNITIES IN REDISTRICTING PLANS

Allan J. Lichtman
Distinguished Professor of History
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Washington, DC 20016

July 30, 2013

Pursuant to 28 U.S.C. § 746, I declare under penalty of perjury that the information set forth in this report is true and correct to the best of my knowledge and belief.

/s/ Allan J. Lichtman
Allan J. Lichtman

I. Qualifications

1. My name is Allan J. Lichtman. My current position is Distinguished Professor of History at American University in Washington, D.C., where I have been employed for 40 years. Formerly, I served as Chair of the History Department and Associate Dean of the College of Arts and Sciences at American University. I received my BA in History from Brandeis University in 1967 and my Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. My areas of expertise include political history, electoral analysis, and historical and quantitative methodology.

2. I am the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as *Political Methodology*, *Journal of Interdisciplinary History*, *International Journal of Forecasting*, and *Social Science History*. In addition, I have coauthored *Ecological Inference* with Dr. Laura Langbein, a standard text on the analysis of social science data, including political information. I have published articles on the application of social science analysis to civil rights issues. This work includes articles in such journals as *Journal of Law and Politics*, *La Raza Law Journal*, *Evaluation Review*, *Journal of Legal Studies*, and *National Law Journal*. My scholarship also includes the use of quantitative and qualitative techniques to conduct contemporary and historical studies, published in such academic journals as *The Proceedings of the National Academy of Sciences*, *The American Historical Review*, *Forecast*, and *The Journal of Social History*. Quantitative and historical analyses also ground my books, *Prejudice and the Old Politics: The Presidential Election of 1928*, *The Thirteen Keys to the Presidency* (co-authored with Ken DeCell), *The Keys to the White House*, and *White Protestant Nation: The Rise of the American Conservative Movement*.

3. My book, *White Protestant Nation*, was one of five finalists for the National Book Critics Circle Award for the best general nonfiction book published in America. My most recent book, co-authored with Richard Breitman, *FDR and the Jews*, was published

under the Belknap Imprint of the Harvard University Press, reserved for works of special significance and lasting impact. This book was an editor's choice book of the *New York Times* in 2013 and has been submitted for the Pulitzer Prize.

4. I have worked as a consultant or expert witness for both plaintiffs and defendants in more than eighty voting and civil rights cases. These include several cases in the state of Alabama and in many other southern states. In the U. S. Supreme Court case, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), the majority opinion written by Justice Kennedy authoritatively cited my statistical work several times. My work includes more than a dozen cases for the United States Department of Justice and cases for many civil rights organizations. I have also worked as a consultant or expert witness numerous times in defending enacted plans from voting rights challenges.

II. Statement of Inquiry

5. I have been asked to examine the voting behavior of African Americans and whites in recent elections held in the state of Alabama. I have been asked to consider whether such voting is polarized along racial lines, with African Americans cohesive behind candidates of their choice and white voters bloc voting against these candidates. I have also been asked to consider the implications of polarized voting and turnout for African American voter opportunities

in alternative illustrative districts for the State House and State Senate. I have attached a CV and a table of cases with this testimony.

III. Summary of Opinions

6. I found that (1) voting is highly polarized along racial lines in recent general elections held in the state of Alabama, with African Americans nearly unanimous in their choice of candidates and whites strongly voting against those African American candidates of choice. I found that (2) African Americans invariably prefer Democratic candidates in general elections and that whites invariably prefer Republican candidates. Thus, party loyalty, which is tied to race, pulls African Americans and whites in different directions. I also found that (3) polarization between African Americans and whites in general elections is greater when the Democratic candidate is African American rather than white. Thus, the direct effect of an African American candidacy creates more racial polarization than would be accounted for by party alone. In addition, I found that (4) these patterns of racially polarized voting indicate that the African American voters would not have reasonable opportunities to elect candidates of their choice to office in districts dominated by whites. In such districts white bloc voting would prevail. Finally, I found that (5) these patterns of polarized voting combined with turnout for African Americans and whites further indicate that African Americans would have an excellent opportunity to elect candidates of their

choice in the plaintiffs' illustrative additional majority-minority districts.

IV. Data and Methods

7. The voting analysis in this report relies on standard data utilized in social science: county-level or precinct by precinct-level election returns for relevant elections, with candidates identified by race and voters categorized as either African Americans or whites. The category white will include some Latinos and others. These ethnic and racial groups comprise a small percentage of Alabama's registered voters and are not concentrated in a sufficient number of precincts for statistical analysis of their voting choices. Data was obtained from counsel and from the website of the Alabama Secretary of State. My understanding is that counsel obtained their information from the state and localities. The analysis utilizes the standard methodology of ecological regression that I have employed in some 80 previous voting rights cases. This procedure was recognized by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied by the Court to single-member districts plans in *Quilter v. Voinovich*, 113 S.Ct 1149 (1993). My analysis based on these methods was cited in the recent *LULAC* Supreme Court case. It was also cited by the three judge court in the 2011 Illinois Congressional litigation: *Committee for a Fair and Balanced Map, et al. v. Illinois State Board of Elections, et al.* 835 F. Supp. 2d 563 – Dist. Court, ND Illinois 2011.

V. Results of Analysis: Elections Held Statewide

8. Table 1 reports the results of an analysis that examines recent elections held statewide in Alabama. Given the difficulty of matching precinct level registration statistics and election returns for the entire state, this analysis uses counties as the basis for statistical study.[1] There are a sufficient number of counties in Alabama (67) and a sufficient range in the percentage of African American registrants (from less than 1 percent to 85 percent) for reliable analysis. The results reported in Table 1 show that African American voters overwhelmingly backed the Democratic candidate in all six statewide elections studied, from 2004 to 2012. In turn, the results in Table 1 demonstrate that whites overwhelmingly bloc voted against the African American candidates of choice. As indicated in the final row of Table 1 black cohesion behind the Democratic candidate averaged 93 percent for all elections, whereas white support for these candidates averaged 24 percent for all elections. Thus, there is a high degree of polarization between the candidate choices of African Americans and whites in the six elections, equal to 69 percentage points (93% minus 24%).

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[1] The registration and election data is often compiled with different precinct designations.

Table 1
Ecological Regression Results for Six General Elections Held Statewide (* Indicates Winner)

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	93%	19%
Sessions (WR) *	7%	81%
2008 President		
Obama (BD)	98%	20%
McCain (WR) *	2%	80%
2012 President		
Obama (BD)	91%	17%
Romney (WR) *	9%	83%
Mean Vote for Black Democrat	**94%**	**19%**
White Versus White Elections		
2004 President		
Kerry (WD)	91%	22%
Bush (WR) *	9%	77%
2008 Justice 1		
Paseur (WD)	90%	37%
Shaw (WR) *	10%	63%

2012 Chief Just		
Vance (WD)	95%	29%
Moore (WR) *	9%	71%
Mean Vote for White Democrats	**92%**	**29%**
Mean Vote for All Democrats	**93%**	**24%**

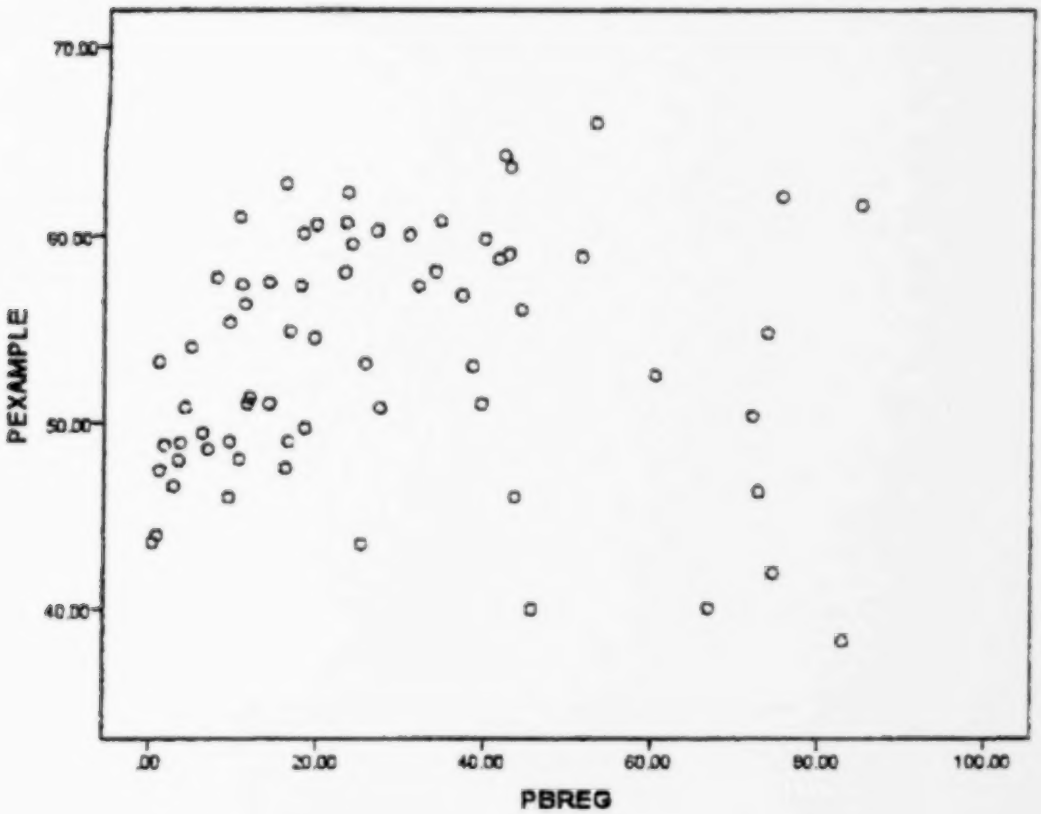
9. Table 1 also demonstrates that polarized voting exists in these general elections independent of party. That is, polarized voting is substantially stronger for elections with black Democrats than for elections with white Democrats. Black cohesion is only slightly lower for white versus white than black versus white elections (94 percent compared to 92 percent). However, white bloc voting against the African American candidate of choice is much more substantial in the black versus white than in the white versus white elections. As indicated in Table 1, only 19 percent of white voters backed black Democrats, whereas 29 percent of white voters backed white Democrats. The degree of polarization in black versus white elections is especially high at 75 percentage points (94% minus 19%), compared to 63 percentage points in white versus white elections (92% minus 29%).

10. Although there is a separate racial component in these results, the influence of party loyalty in the South is intimately tied to race. Democratic President Lyndon Johnson's backing for the Civil Rights

Act of 1964 and the Voting Rights Act of 1965 cemented the loyalties of African Americans to the Democratic Party and pushed white southerners towards the Republicans. The shift of white southern voters in the latter part of the 20th century from the most reliable of Democrats to the most loyal of Republicans is one of the most dramatic political transformations in U. S. history.

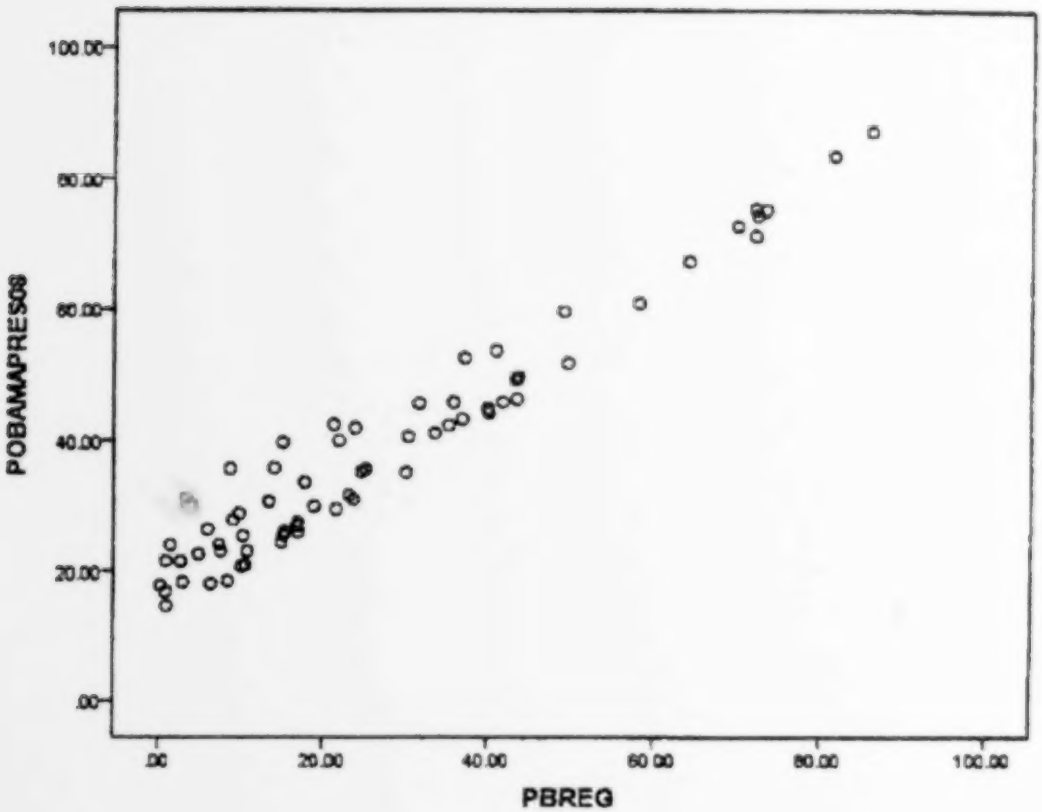
11. The reliability of the ecologically regression results is sustained by Charts 1 to 6 in Appendix I that portray for each of the six statewide elections the relationship between the percentage of African American registrants in a county and the percentage of the two-party vote for the Democratic candidate. In these "scattergrams" the X axis represents the percentage of African American registrants in each of the state's counties and the Y axis the percentage of the two-party vote for the Democratic candidate. Each point on the scattergram represents the intersection of each precincts percentage of African Americans and its percentage of the two-party Democratic vote. Chart 7 of Appendix I displays an example of a relationship where there is a lack of polarization between African Americans and whites.

Chart 7: Sample Chart Showing a Lack of Polarization Between African American and White Registrants in Each County



The chart shows no tight linear relationship, but rather a diffuse cloud of counties. In contrast, charts 1 to 6 portray a very tight upward sweeping linear relationship between the racial composition of the counties and the distribution of the vote in the counties, as in Chart 2, which reflects the vote for and against Obama in the 2008 presidential election.

Chart 2: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General



As the African American composition of a county increases, so does its vote for the Democratic candidate in each of six election. This close relationship displayed in Charts 1 to 6 is very rarely found in social science. It should also be noted that as compared to African American Democrats, the charts for white Democrats are pitched higher on the Y axis and slowly a slightly less tight relationship between race and the vote emerges. This reflects the greater white vote for white Democratic candidates, compared to black Democratic candidates.

12. Charts 1 to 6 also demonstrate that counties are remarkably consistent in voting patterns. There is no indication in these charts of substantial differences in various parts of the state in polarized voting between African Americans and whites. That is, there are no groups of counties that stand out as markedly different from the overall relationships between race and voting displayed in the charts across the state. Rather counties are tightly clustered in a linear pattern for a variety of elections across three election cycles. The results are especially consistent across counties for the three elections with African American candidates.

13. The ecological regression results are additionally confirmed by the scrutiny of exit polls. These polls are based on a methodology that is strictly independent of ecological regression. Exit polls involve no analysis of election returns; they are based on responses to questions presented to voters upon leaving the polls on Election Day. As indicated in Table 2, exit polls for Alabama are available for three black vs. white and one white versus white of the six statewide elections studied. These results show nearly the same pattern of polarized voting as the ecological regression results. In fact, the exit polls show a higher level of polarization than the ecological regression results for each of the four elections included in both Table 1 and Table 2. The exit poll results reported in Table 2 also confirm that polarization in greater in elections with black Democrat as compared to elections with white Democrats – 83 percentage points (95% minus 12%) versus 74 percentage points (93% minus 19%).

VI. Results of Analysis: Statewide Elections in Key Counties

14. Tables 3 to 5 report the results of an analysis that examines recent statewide elections within the three individual counties for which illustrative additional districts are presented: Jefferson, Madison, and Montgomery counties. I have been able to match most precinct level registration and election results for all contests presented above from 2008 and 2012. The results reported in Tables 3 to 5 show patterns of racial polarization quite similar to those found for the statewide county by county analysis. In each election in each county, African American voters unite in virtual unanimity behind their candidates of choice, whereas a substantial majority of white voters vote against these candidates.

Table 2
Exit Poll Results for Four General Elections Held Statewide (* Indicates Winner)

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	92%	11%
Sessions (WR) *	8%	89%
2008 President		
Obama (BD)	98%	10%
McCain (WR) *	2%	90%

2012 President		
Obama (BD)	95%	15%
Romney (WR) *	5%	85%
Mean Vote for Black Democrat	**95%**	**12%**
White Versus White Election		
2004 President		
Kerry (WD)	**93%**	**19%**
Bush (WR) *	7%	81%
Mean Vote for All Democrats	**95%**	**14%**
Source: CNN.com. Results reflect only two-party totals.		

15. Again, white bloc voting against the candidates of choice of black voters is strongest in elections with black candidates. In Jefferson County, Table 3 demonstrates that a mean of 19 percent of white voters backed the black candidate of choice of black voters for a polarization rate of 81 percent. A mean of 33 percent of white voters backed the white candidate of choice of black voters in Jefferson County, for a polarization rate of 67 percent. For all five elections in Jefferson County, a mean of 25 percent of white voters backed the candidate of choice of black voters, for a polarization rate of 75 percent.

16. In Madison County, Table 4 demonstrates that a mean of 24 percent of white voters backed the black candidate of choice of black voters for a

polarization rate of 76 percent. A mean of 36 percent of white voters backed the white candidate of choice of black voters in Madison County, for a polarization rate of 64 percent. For all five elections in Madison County, a mean of 29 percent of white voters backed the candidate of choice of black voters, for a polarization rate of 71 percent.

17. In Montgomery County, Table 5 demonstrates that a mean of 20 percent of white voters backed the black candidate of choice of black voters for a polarization rate of 80 percent. A mean of 41 percent of white voters backed the white candidate of choice of black voters in Montgomery County, for a polarization rate of 59 percent. For all five elections in Montgomery County, a mean of 28 percent of white voters backed the candidate of choice of black voters, for a polarization rate of 72 percent.

Table 3
Ecological Regression Results Within Jefferson County for Five General Elections Held Statewide

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	100%	17%
Sessions (WR) *	0%	83%

2008 President		
Obama (BD)	100%	21%
McCain (WR) *	0%	80%
2012 President		
Obama (BD)	100%	20%
Romney (WR) *	0%	83%
Mean Vote for Black Democrat	**100%**	**19%**
White Versus White Elections		
2008 Justice 1		
Paseur (WD)	100%	28%
Shaw (WR) *	0%	72%
2012 Chief Just		
Vance (WD)	100%	38%
Moore (WR) *	0%	62%
Mean Vote for White Democrats	**100%**	**33%**
Mean Vote for All Democrats	**100%**	**25%**

Table 4
Ecological Regression Results Within Madison County for Five General Elections Held Statewide

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	100%	19%
Sessions (WR) *	0%	81%
2008 President		
Obama (BD)	100%	27%
McCain (WR) *	0%	83%
2012 President		
Obama (BD)	100%	26%
Romney (WR) *	0%	84%
Mean Vote for Black Democrat	**100%**	**24%**
White Versus White Elections		
2008 Justice 1		
Paseur (WD)	100%	39%
Shaw (WR) *	0%	61%
2012 Chief Just		
Vane (WD)	100%	33%
Moore (WR) *	0%	67%
Mean Vote for White Democrats	**100%**	**36%**
Mean Vote for All Democrats	**100%**	**29%**

Table 5
Ecological Regression Results Within Montgomery County for Five General Elections Held Statewide

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	100%	17%
Sessions (WR) *	0%	81%
2008 President		
Obama (BD)	100%	22%
McCain (WR) *	0%	83%
2012 President		
Obama (BD)	100%	20%
Romney (WR) *	0%	84%
Mean Vote for Black Democrat	**100%**	**20%**
White Versus White Elections		
2008 Justice 1		
Paseur (WD)	100%	41%
Shaw (WR) *	0%	59%
2012 Chief Just		
Vane (WD)	100%	41%
Moore (WR) *	0%	59%
Mean Vote for White Democrats	**100%**	**41%**
Mean Vote for All Democrats	**100%**	**28%**

18. The reliability of the ecologically regression results is sustained by Charts included in Appendices 2 to 4, that portray the relationship between the percentage of African American registrants within individual precincts and the percentage of the two-party vote for the Democratic candidate for each of the five elections and three counties. These charts demonstrate across five elections and three counties that even for units as small as precincts there is a very tight linear relationship between the racial composition of the precincts and the distribution of the vote in the precincts. The only substantial exception occurs for a few heavily white precincts in Jefferson County that provided a majority of their votes for the candidate of choice of black voters.

19. The estimates in Tables 3 to 5 of one hundred percent black cohesion does not mean that not a single voter diverged from the pattern shown. Estimates of zero and one hundred do sometimes occur at the far extremes in ecological regression analysis and indicate extremely high cohesion or bloc voting. A cohesion finding of 100 percent or very close to 100 percent is confirmed by the precinct-level charts in Appendices 2 to 4, which show that as the black registration percentage in a precinct approaches 100 percent, the vote for the candidate of choice of black voters likewise approaches 100 percent. Similar results emerged for some contests in the 2003 analyses in *LULAC v. Perry* and in the 2011 analyses in *Committee for a Fair and Balanced Map, et al. v. Illinois State Board of Elections, et al.*

VII. Results of Analysis: State House and Senate Elections

20. Table 6 reports the results of ecological regression analysis for elections held within State House and State Senate elections in areas of interest within Alabama.[2] These results are similar to those found for elections held statewide, showing both overwhelming African American cohesion behind candidates of their choice and substantial white bloc voting against these candidates. As indicated in the final row of Table 6 black cohesion behind the Democratic candidate averaged 94 percent for all elections, whereas white support for these candidates averaged 27 percent for all elections. Thus, the degree of polarized voting in the six elections is 67 percentage points (94% minus 27%), very close to the 69 percentage points found for the six elections held statewide. Once again, white bloc voting against the African American candidate of choice is much more substantial in the black versus white than in the white versus white elections. As indicated in Table 6, only 15 percent of white voters backed African American Democrats, whereas 34 percent of white voters backed the white Democrat. The degree of polarization in black versus white elections is 82 percentage points (97% minus 15%),

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[2] For districts with multiple counties it was not possible always to match election returns with regression data. In no case, however, was more than a single county not included. Also, there are additional elections for which matching information was not available.

compared to 58 percentage points in white versus white elections (92% minus 34%).

VIII. Results of Analysis: Native American and Hispanic Voting

21. There is an insufficient concentration of Native Americans or Hispanics in the state of Alabama for ecological regression analysis. However, there is evidence pointing to the cohesion of these two groups with the choices of African Americans in general elections. With respect to Native American voting some indication of preferences is provided by the McIntosh High School precinct in Senate District 22, Washington County. This precinct has a Native American plurality with 41 percent of registered voters. African Americans comprise another 23 percent of registrants for a combined Native American African American majority of 64 percent. In the 2006 general election for State Senate this precinct cast 75 percent of its vote for the Democrat Lindsay and in the 2010 general election for State Senate it cast 87 percent of its vote for the Democrat Keahey. These results point to a voting coalition of Native Americans and African Americans given that about 60 percent of white voters overall backed the Republican candidates in these two elections.

Table 6
Ecological Regression Results for General Elections in State House & Senate Districts
(* Indicates Winner)

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2009 Senate D9		
Hall (BD)	100%	17%
Sanford (WR) *	0%	83%
2010 House D84		
Forte (BD) *	90%	0%
Perrin (WR)	10%	100%
2010 House D85		
Grimsley (BD) *	100%	29%
Singleton (WR)	0%	71%
Mean Vote for Black Democrat	**97%**	**15%**
White Versus White Elections		
2006 Senate D22		
Lindsey (WD) *	79%	41%
McMillan (WR)	21%	59%
2010 Senate D7		
Enfinger (WD)	88%	24%
Sanford (WR) *	12%	76%

2010 Senate D11		
Fielding (WD) *	100%	34%
Robbins (WR)	0%	66%
2010 Senate D22		
Keahey (WD) *	91%	40%
Joyner (WR)	9%	60%
2010 House D73		
Hubbard (WD) *	100%	30%
Grimes (WR)	0%	70%
Mean Vote for White Democrats	**92%**	**34%**
Mean Vote for All Democrats	**94%**	**27%**

22. With respect to Hispanics, there are no precincts comparable to McIntosh High School for Indians. However, it is well established that with the exception of Cuban-Americans, Hispanics are overwhelmingly Democratic in their choice of candidates. (see, Mark Hugo Lopez and Paul Taylor, *Latino Voters in the 2012 Election*, Pew Research Hispanic Center, November 12, 2012 (http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election/). Recent Census data indicates that the Hispanic population of Alabama is almost entirely non-Cuban. The Census reports country of origin among foreign born Hispanics. In Alabama, the percentage with origins in Cuba is an inconsequential 1.4 percent. (Table B05006, *Place of Birth for the Foreign-Born Population*, 2007-2011, American Community Survey, Three Year

Estimates). Given that these foreign born would also comprise most parents of native born Hispanics, the overall Hispanic population should closely reflect the minimal percentage reported above.

IX. Results of Analysis: African American Voter Opportunities

23. The consideration of African American and white turnout in Alabama provides additional perspective on these polarized voting results. Today African American participation in elections in Alabama is at least comparable and likely above white participation. According to statistics compiled by the Alabama Secretary of State, African Americans now comprise some 26.9 percent of active registered voters in the state. This is higher than the African American percentage of the voting age population, which is 25.2 percent. For the most recent elections, held in 2012, the percentage of African Americans among voters was higher yet at 28 percent according to exit poll data. Estimation of the percentage of African American voters in 2012 based on ecological regression yields slightly higher results at some 30 percent. However, as indicated below, African American voter opportunities in districts that are above 46 percent African American voting age population are by no means dependent on equal or higher African American turnout, given the extremely high cohesion of this voter group.

24. These polarized voting and turnout results demonstrate that African Americans in Alabama would find their opportunities to elect candidates of their choice and participate fully in the political process impeded in state legislative districts dominated by whites. However, the very high degree of black cohesion combined with white crossover demonstrates that it is not necessary to draw super-majority African American districts to provide African Americans a reasonable opportunity to elect candidates of their choice to the state legislature.

25. Analysis demonstrates that all three of the illustrative alternative districts attached to this report would provide African American voters an excellent opportunity to elect candidates of their choice. Table 7 presents the demography of the three districts and Table 8 presents projections of the vote for African American candidates of choice based on county-specific turnout rates and the levels of black cohesion and white crossover voting presented in Tables 3-5. The results reported in Table 8 show that the candidate of choice of African American voters would be a clear winner, even if the analysis is only limited to elections with black candidates. These analyses focus on general elections. With respect to primary elections, African Americans are overwhelmingly Democratic and whites overwhelmingly Republican. African Americans in such districts would thus constitute the great majority of primary voters and be able to nominate their candidate of choice (a candidate of choice of African American voters could be of any race).

26. These findings are sustained by the actual results of elections in Alabama. There are three districts in the current State House plan that are equal to or greater than 40 percent African American in their voting age population, but less than 50 percent. The African American voting age populations in these districts range from 46 percent to 49.7 percent, close to the percentages for the illustrative districts. As indicated in Table 9, Democrats won all three districts and African American candidates prevailed in two of the three districts in 2010, a bad year for Democrats in Alabama and across the nation. These findings regarding opportunities for African American voters in below 50 percent but above 40 percent African American VAP are comparable to my recent findings for other states, including North Carolina and Illinois.[3]

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[3] See declaration of Allan Lichtman in *North Carolina Branches of the NAACP et al. v. State of North Carolina, et al.* Civil Action No: 11-CV-01640, in the North Carolina General Court of Justice, County of Wake, Superior Court Division and Lichtman, Testimony Before the Senate and House Redistricting Committees, Illinois, May 24, 2011, http://www.ilhousedems.com/redistricting/?page_id=417.

Table 7
Demographic Analysis of Illustrative Alternative State Legislative Districts

District	% Minority	% Black	% Black Voting Age
Jefferson Co. House	63.7%	55.7%	53.0%
Montgomery Co. House	55.6%	50.4%	46.6%
Madison Co. Senate	58.0%	48.4%	46.5%

Table 8
Projected Votes for Candidate of Choice of Black Voters, Illustrative Alternative Districts

District	Black Vote for Preferred Candidate of Black Voters	White Vote for Preferred Candidate of Black Voters	Total Vote for Preferred Candidate of Black Voters
Jefferson Co. House	52%	13%	**65%**

Montgomery Co. House	40%	17%	**57%**
Madison Co. Senate	43%	16%	**59%**
District	Black Vote for Preferred Candidate of Black Voters	White Vote for Preferred Candidate of Black Voters	Total Vote for Preferred Candidate of Black Voters
Jefferson Co. House	52%	10%	**62%**
Montgomery Co. House	40%	14%	**54%**
Madison Co. Senate	43%	11%	**54%**

27. Plaintiffs in this case have presented illustrative partial plans showing that it is possible to create additional African American opportunity districts in both the House and the Senate (see also, Report of Bill Cooper submitted for this litigation). Those illustrations, which are the basis of the projections above, are attached as Appendix VI of this report.

Table 9
Election Results in State Legislative Districts Below 50% African American VAP and Above 40% African American VAP, 2010 General Election

Current House District	African American VAP % 2010 Census	Winning Candidate in 2010	
HD 73	46.0%	Hubbard (WD)	
HD 84	49.7%	Forte (BD)	
HD 85	46.1%	Grimsley (BD)	

Appendix I: Charts Showing Relationship Between Percentage of African American Registrants in Counties and the Percentage of the Vote for Candidate of Choice of African American Voters as Demonstrated In Table 1

Chart 1: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Kerry, 2004 Presidential General

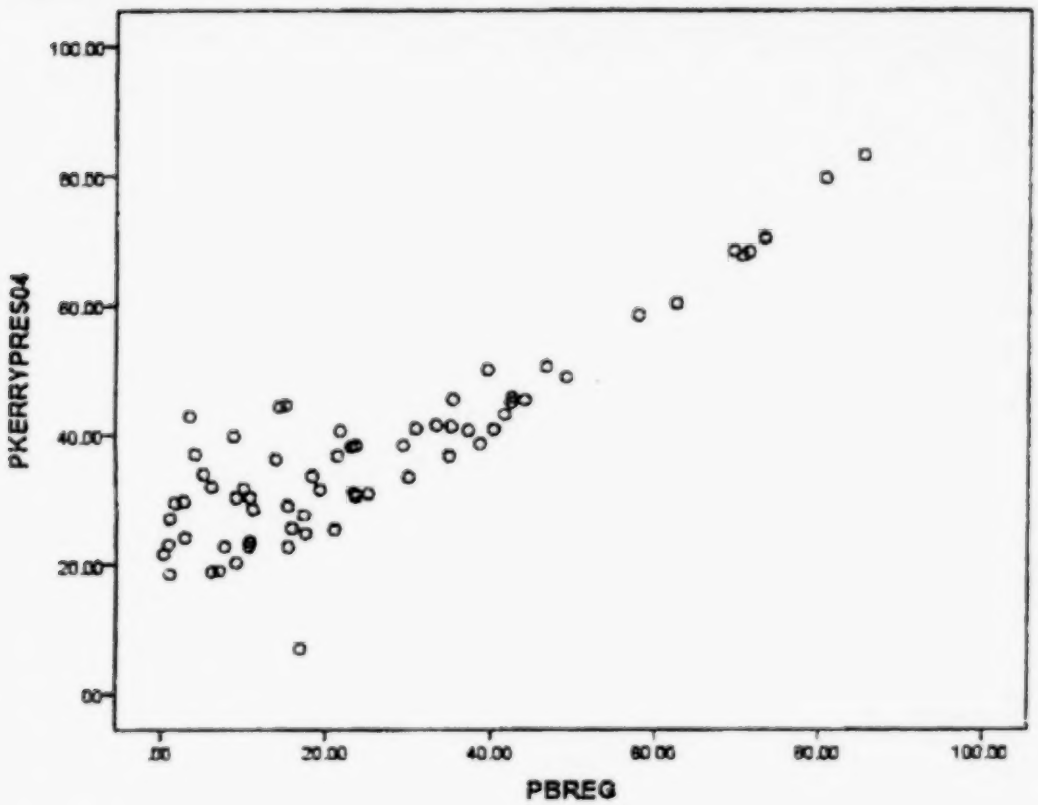


Chart 2: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

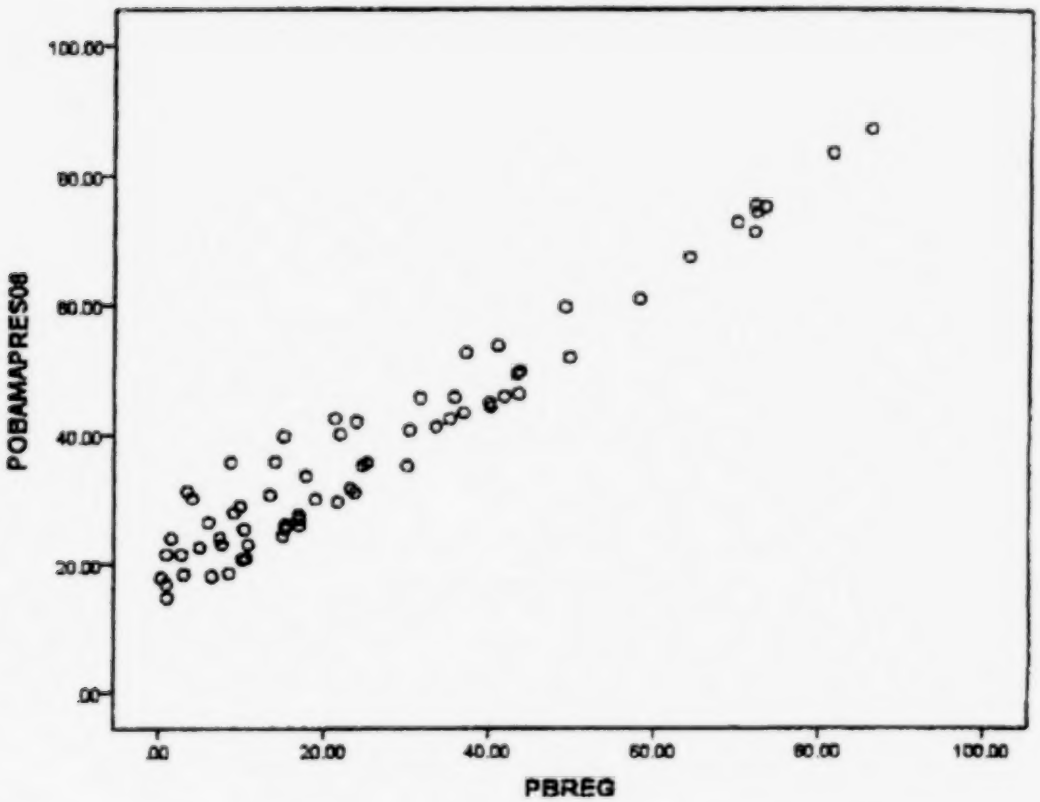


Chart 3: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

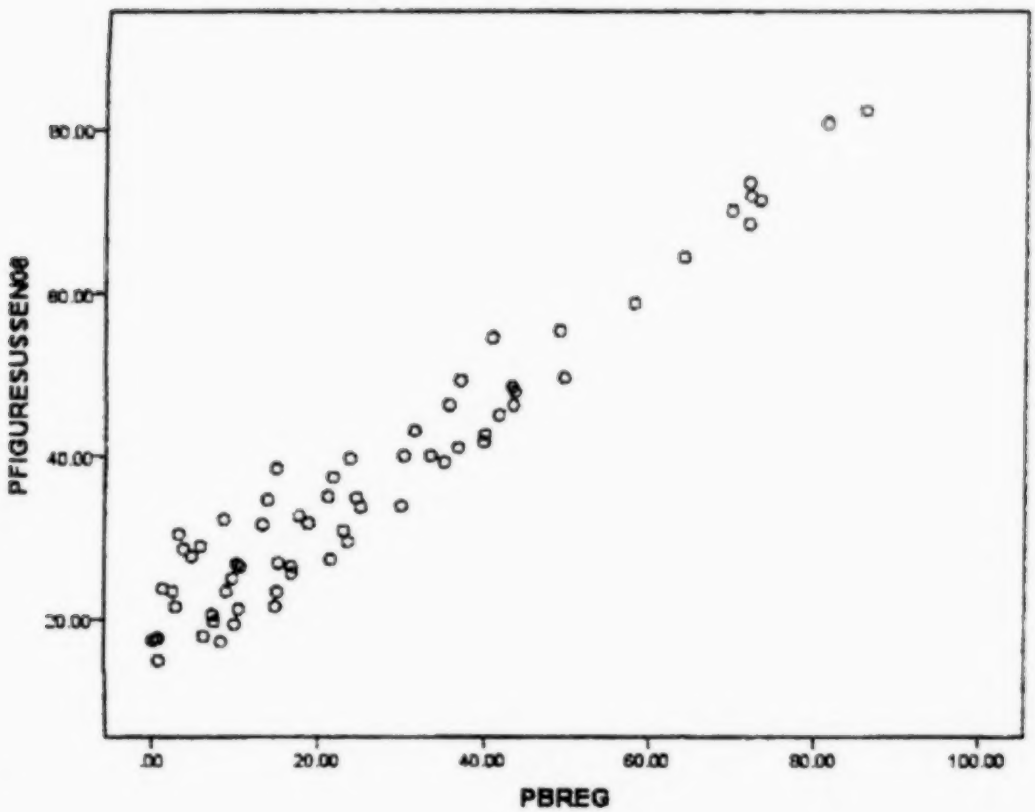


Chart 4: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

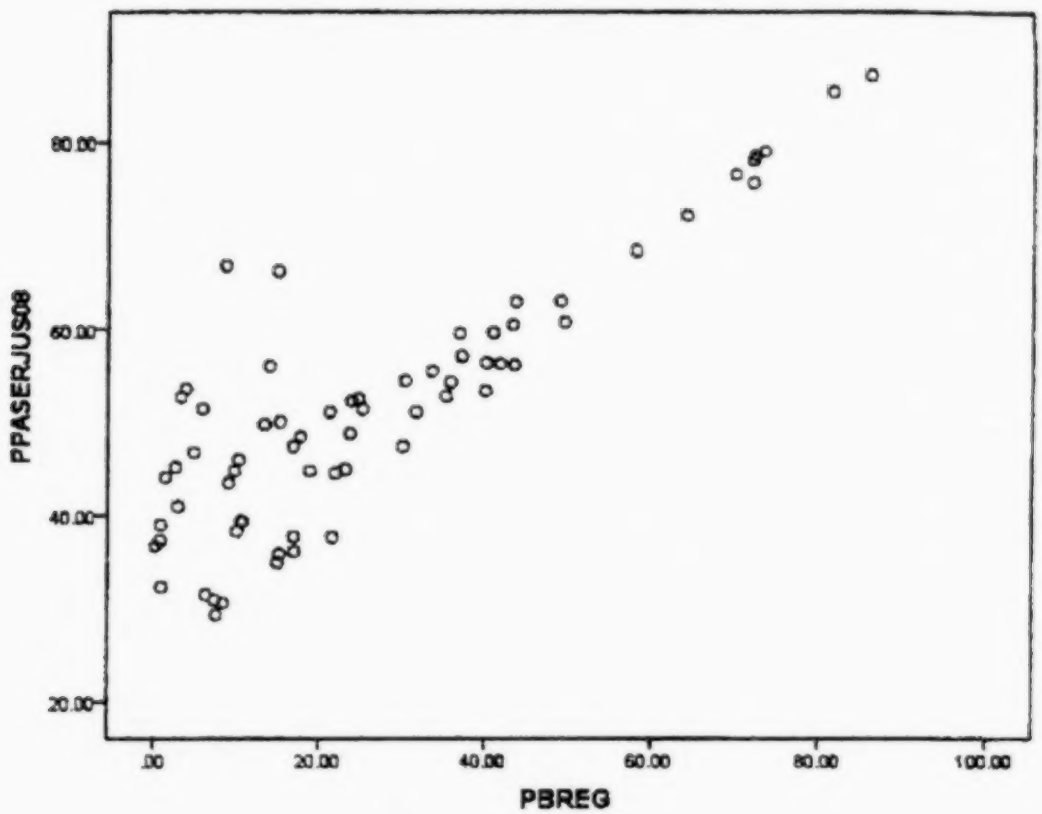


Chart 5: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

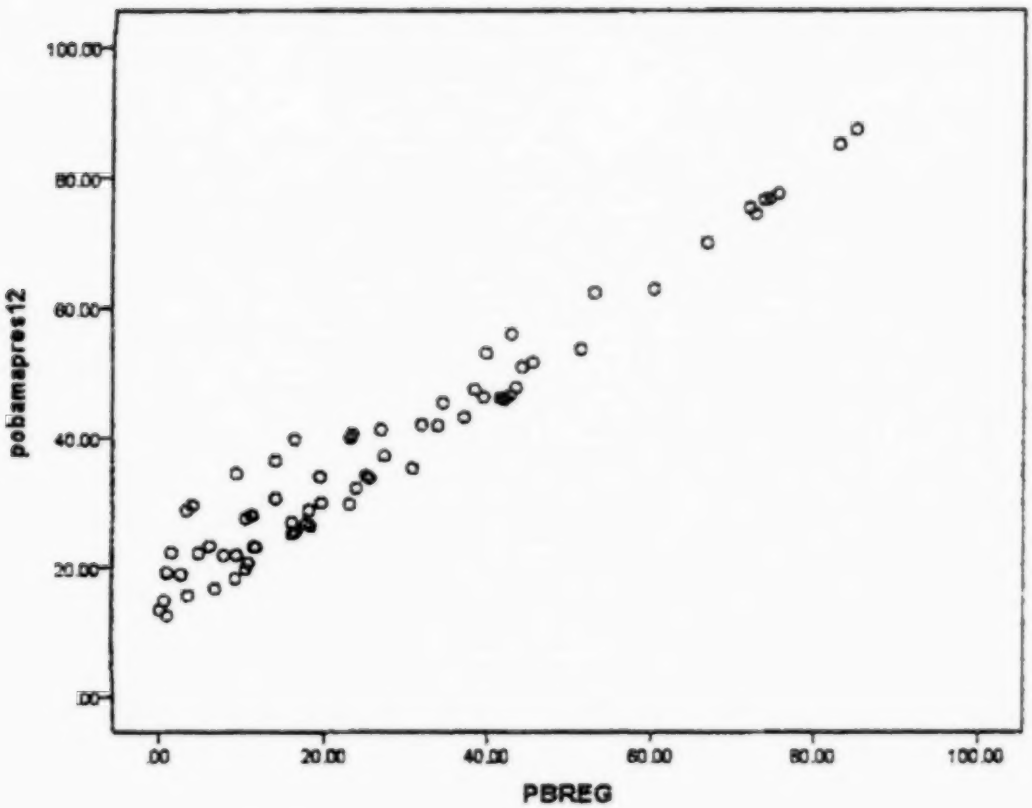


Chart 6: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General

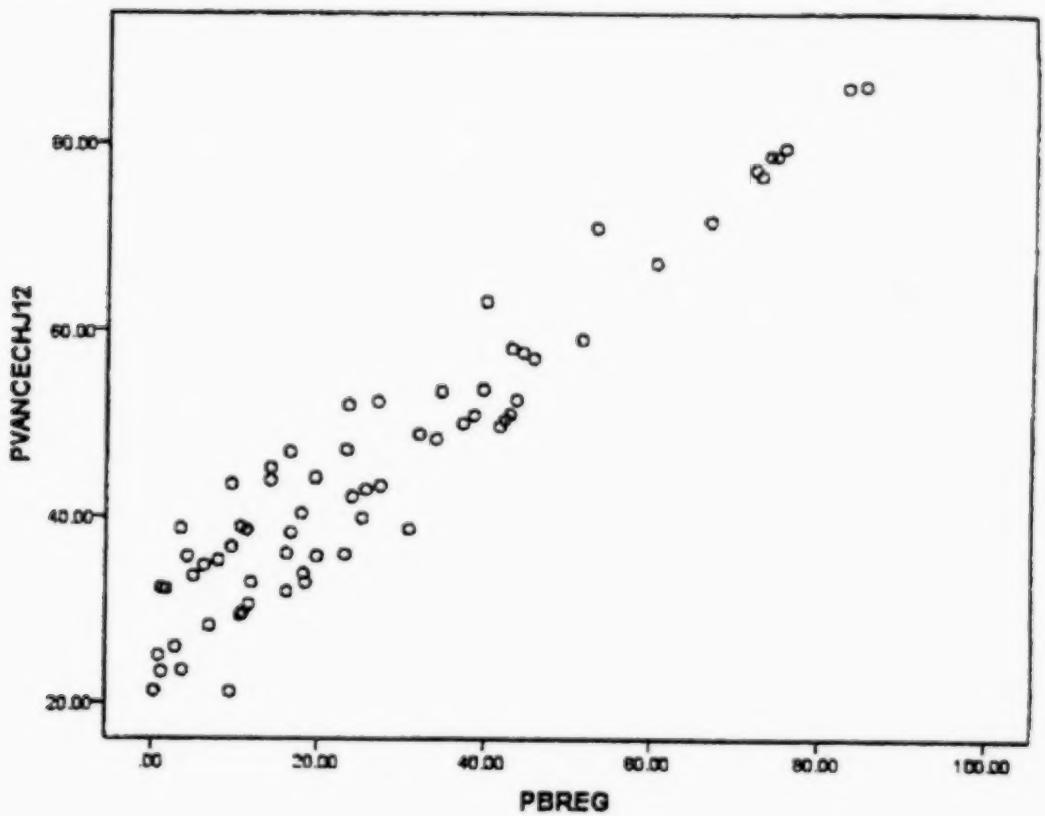
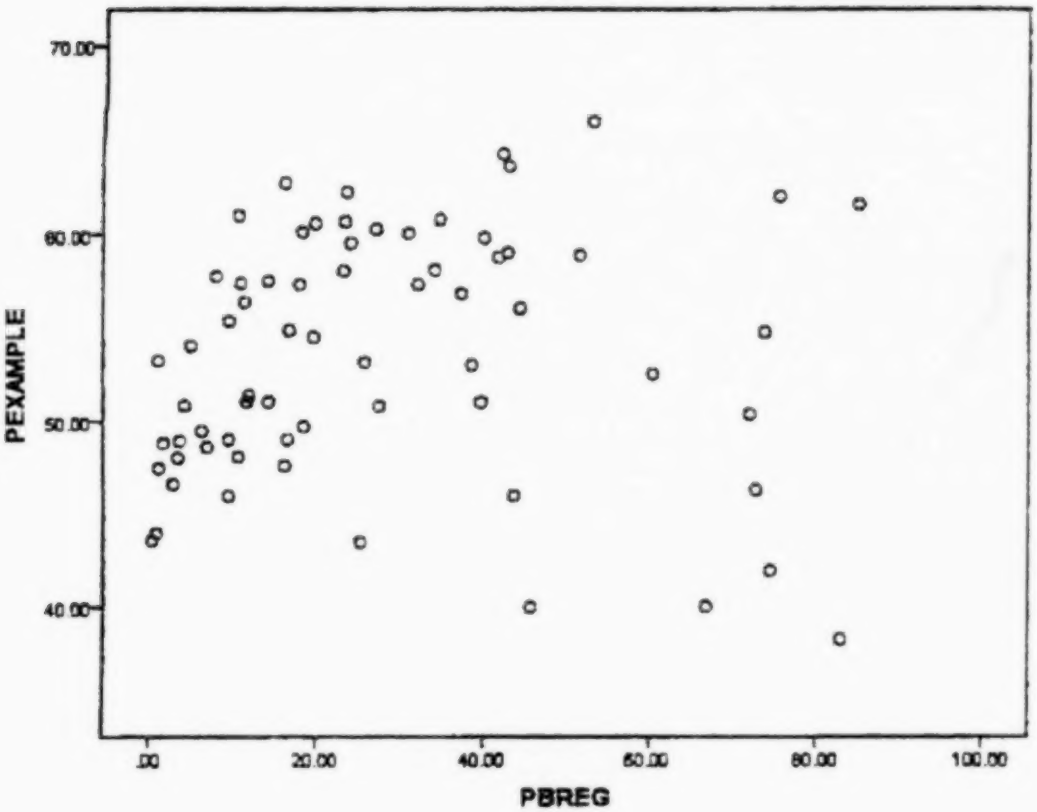


Chart 7: Sample Chart Showing a Lack of Polarization Between African American and White Registrants in Each County



Appendix II: Charts Showing Relationship Between Percentage of African American Registrants in Precincts and the Percentage of the Vote for Candidate of Choice of African American Voters in Jefferson County as Demonstrated In Table 3

Chart Jefferson1: Jefferson County Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

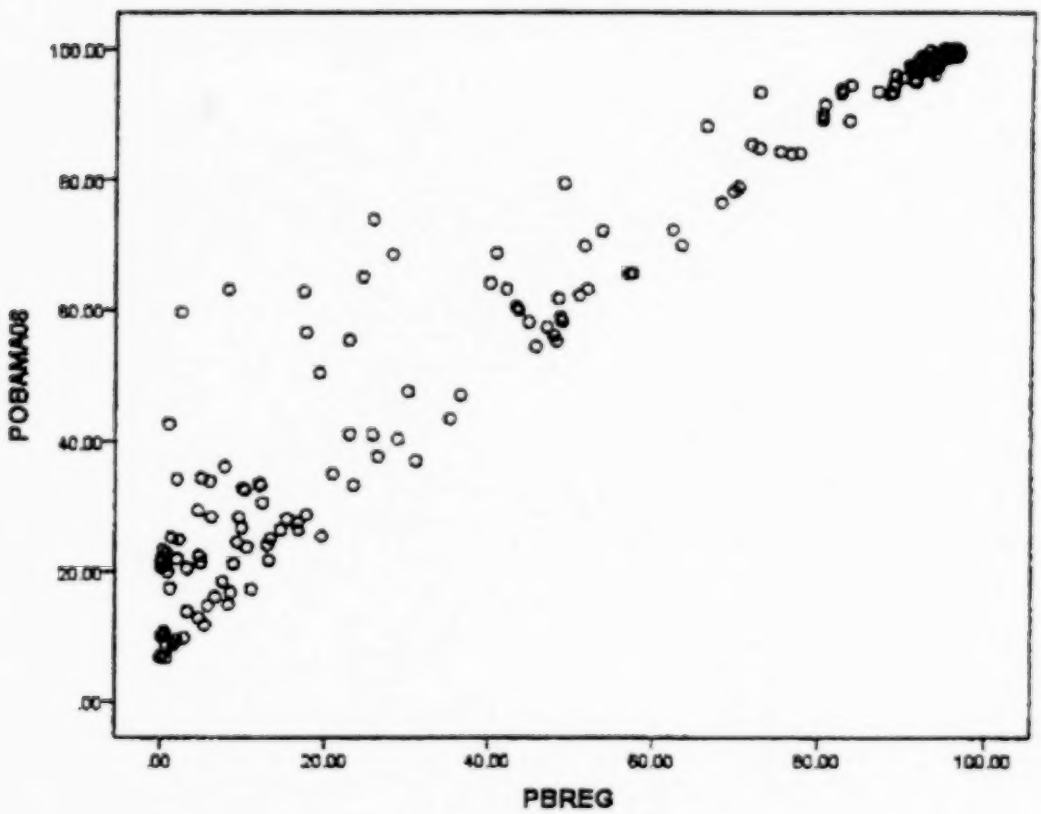


Chart Jefferson2: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

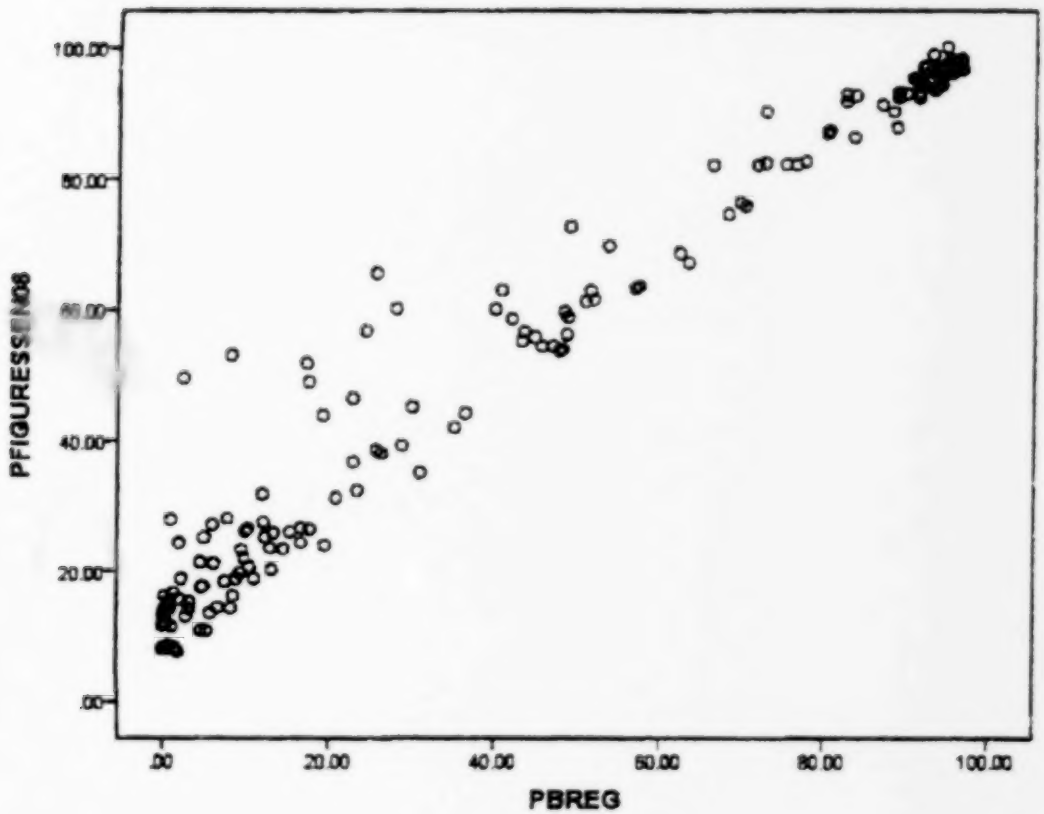


Chart Jefferson3: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

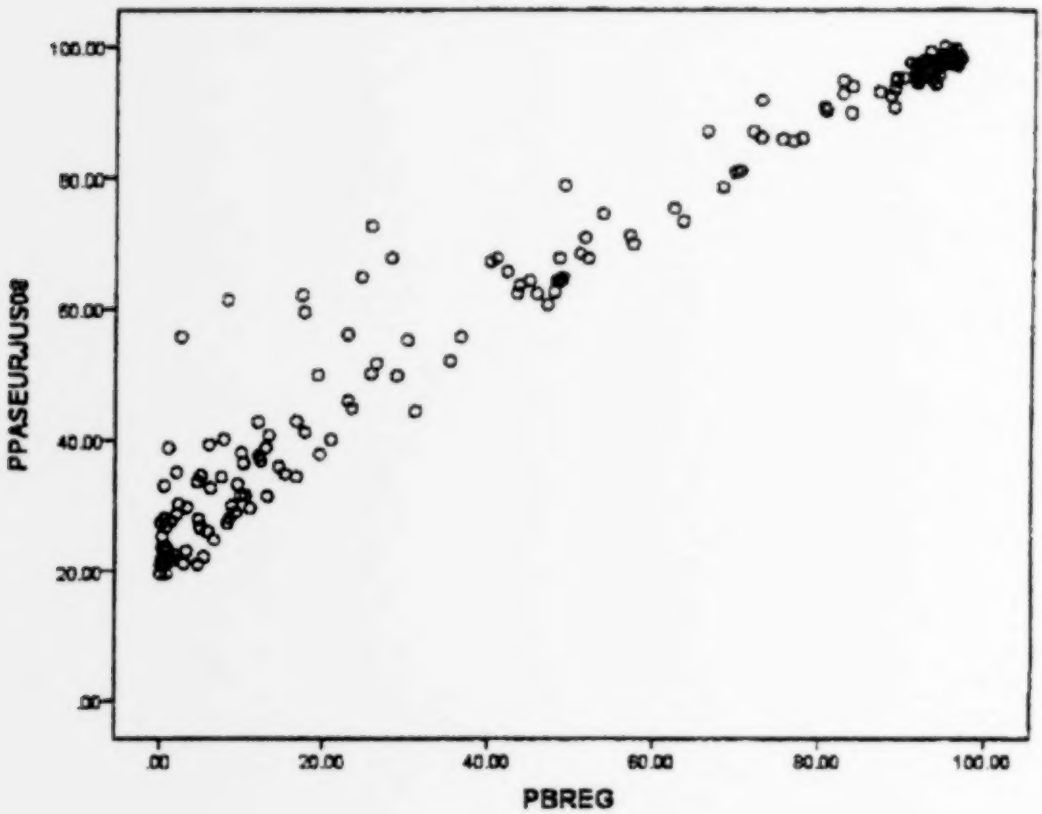


Chart Jefferson4: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

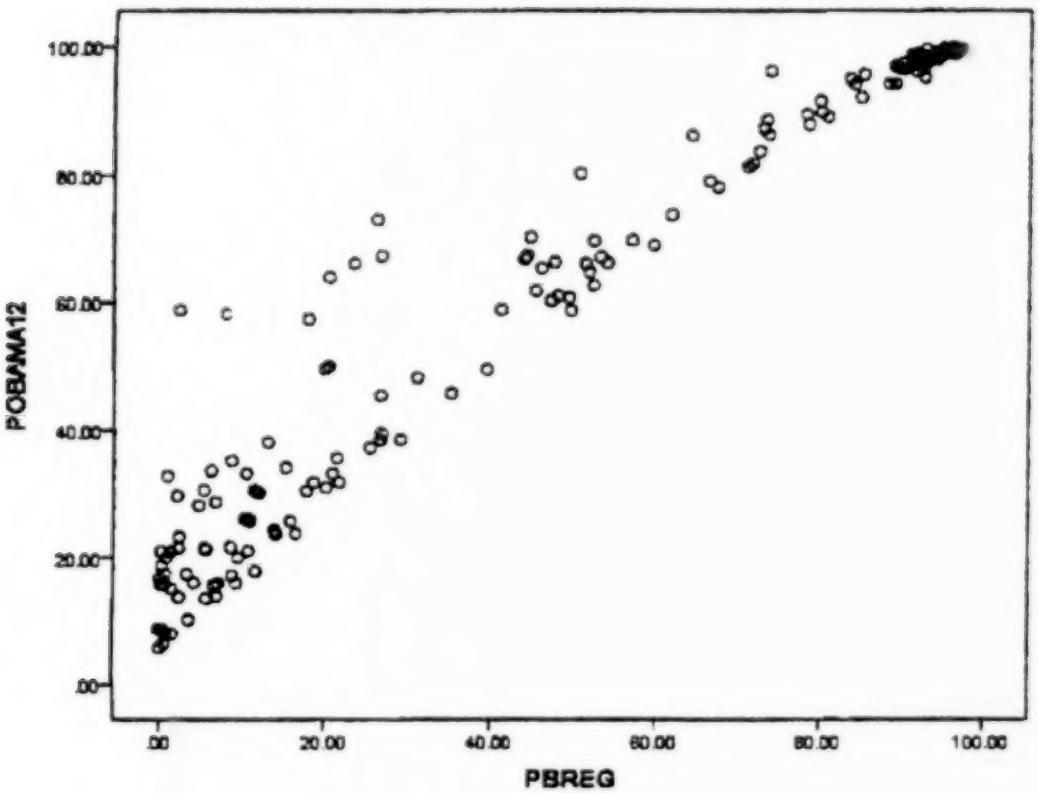
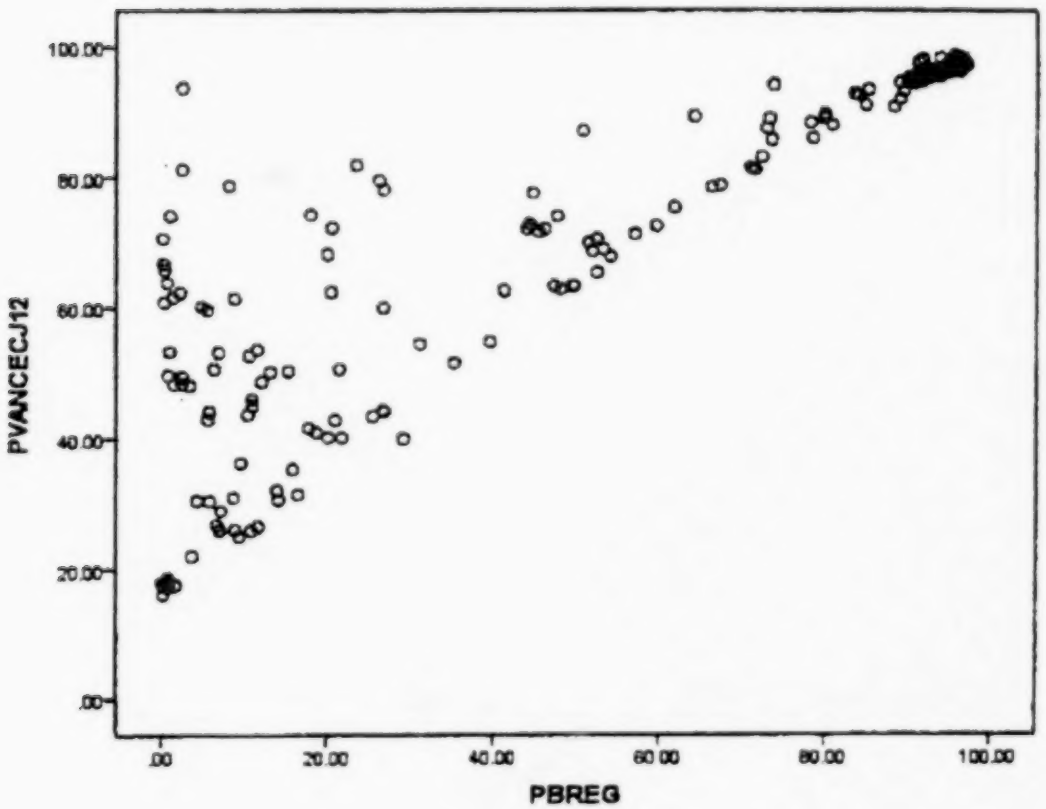


Chart Jefferson5: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General



Appendix III: Charts Showing Relationship Between Percentage of African American Registrants in Precincts and the Percentage of the Vote for Candidate of Choice of African American Voters in Madison County as Demonstrated In Table 4

Chart Madison1: Madison County Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

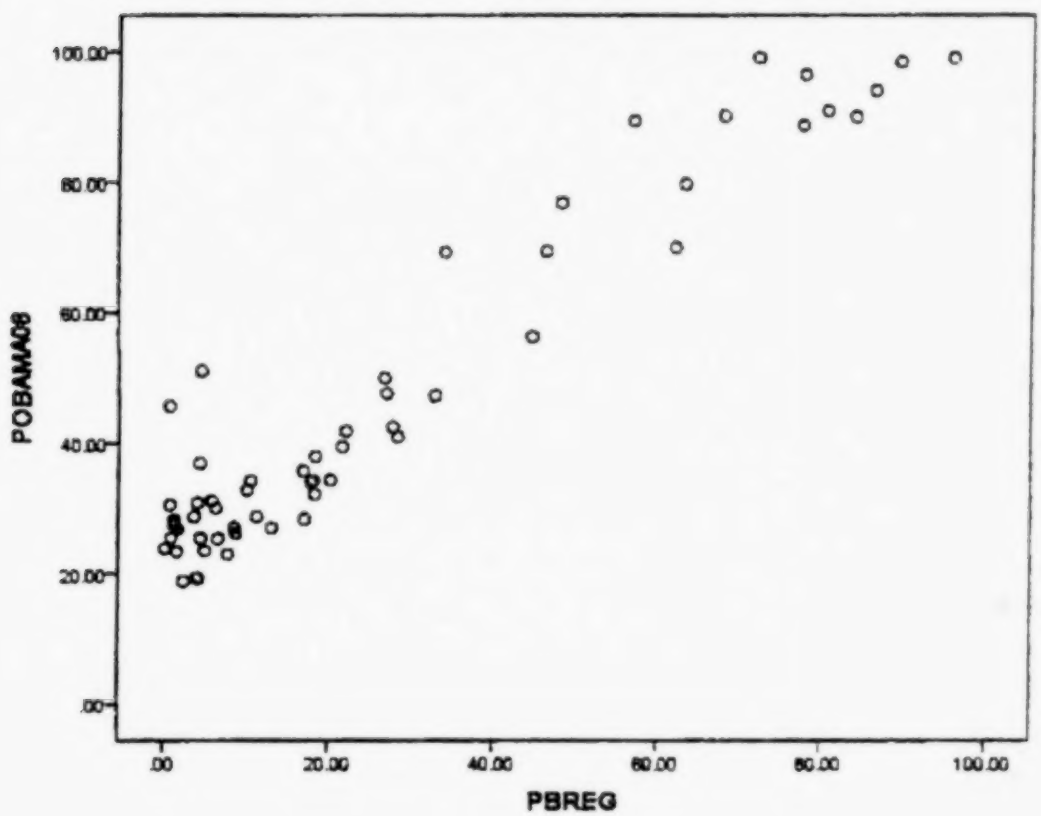


Chart Madison2: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

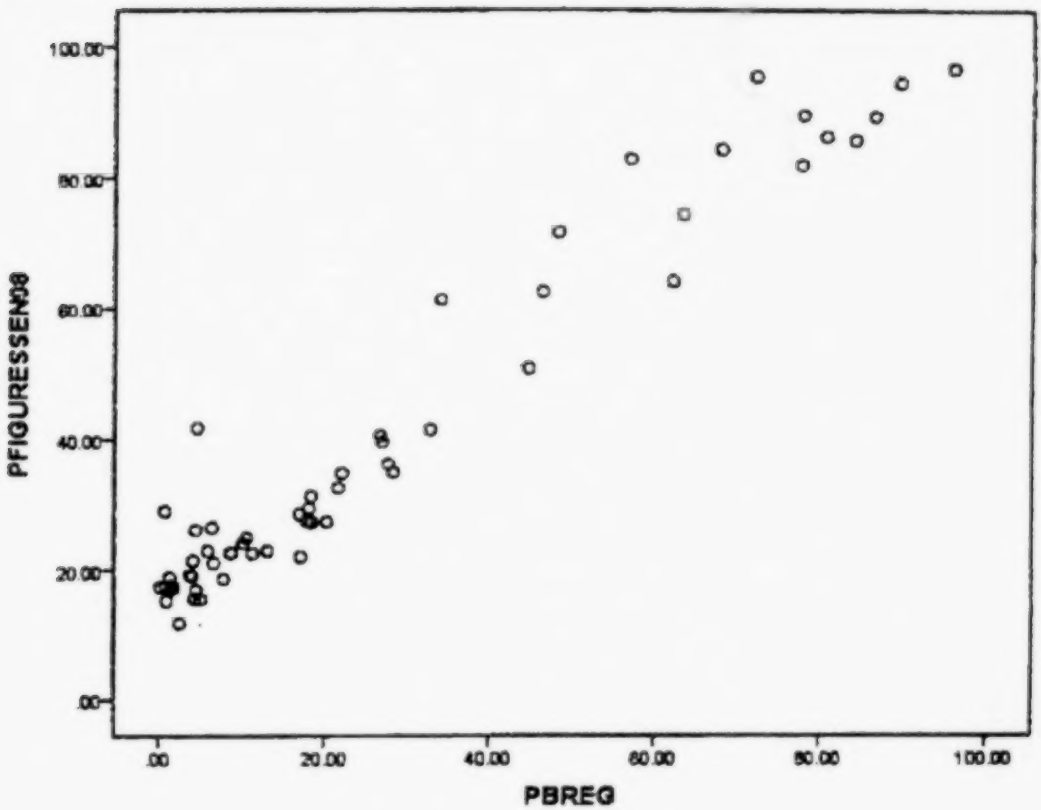


Chart Madison3: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

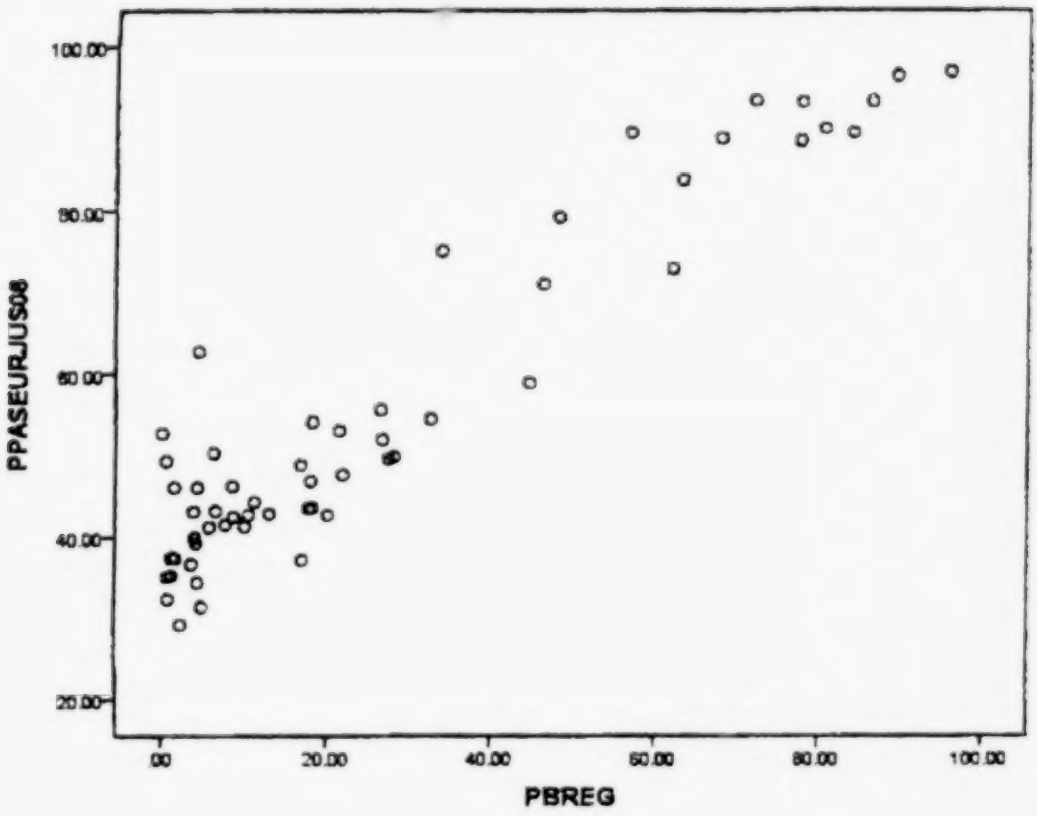


Chart Madison4: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

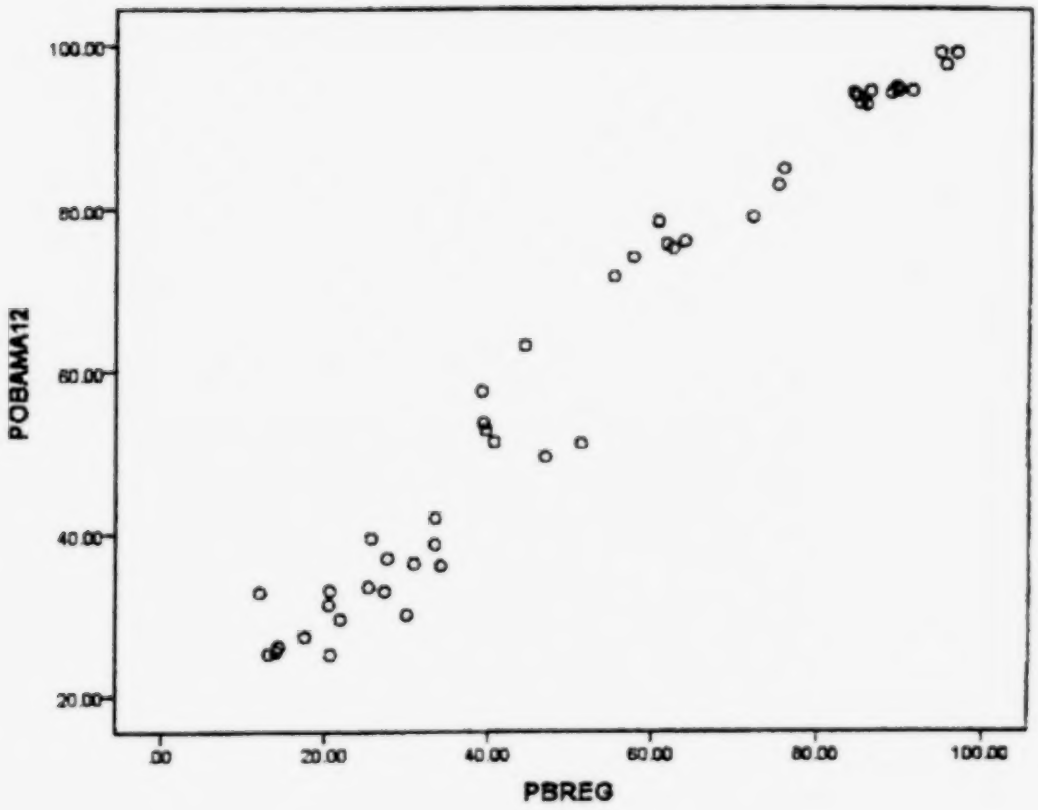
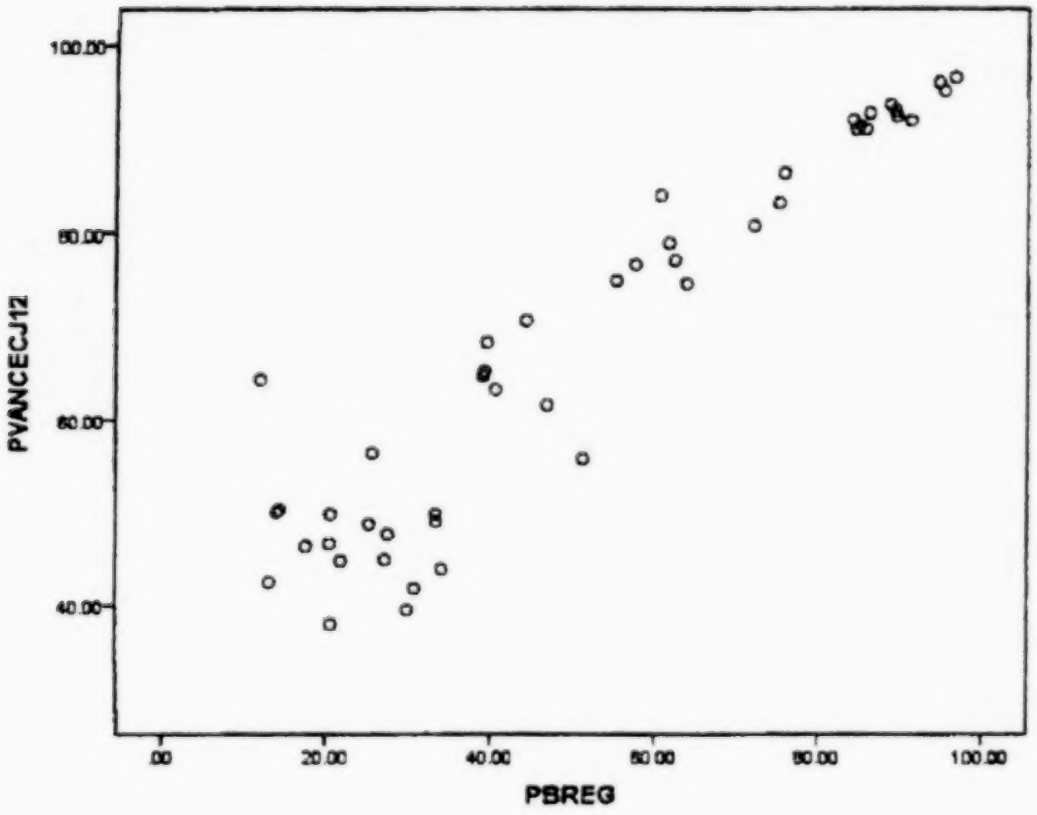


Chart Madison5: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General



Appendix IV: Charts Showing Relationship Between Percentage of African American Registrants in Precincts and the Percentage of the Vote for Candidate of Choice of African American Voters in Montgomery County as Demonstrated In Table 5

Chart Montgomery1: Montgomery County Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

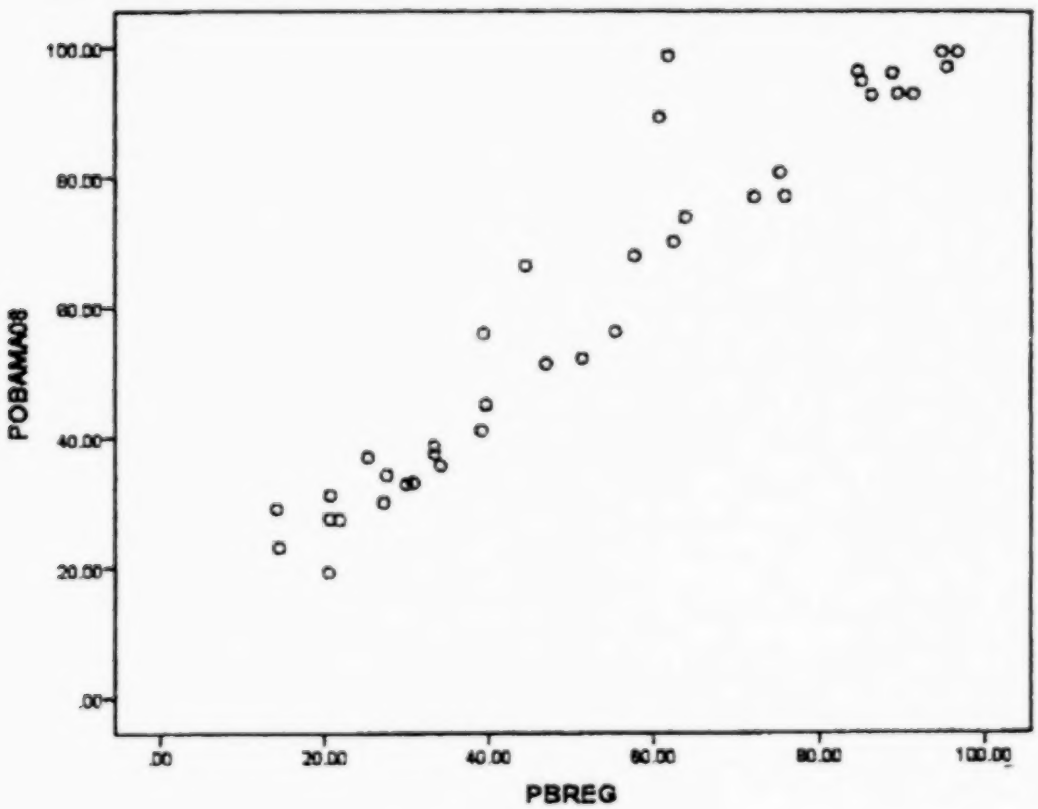


Chart Montgomery2: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

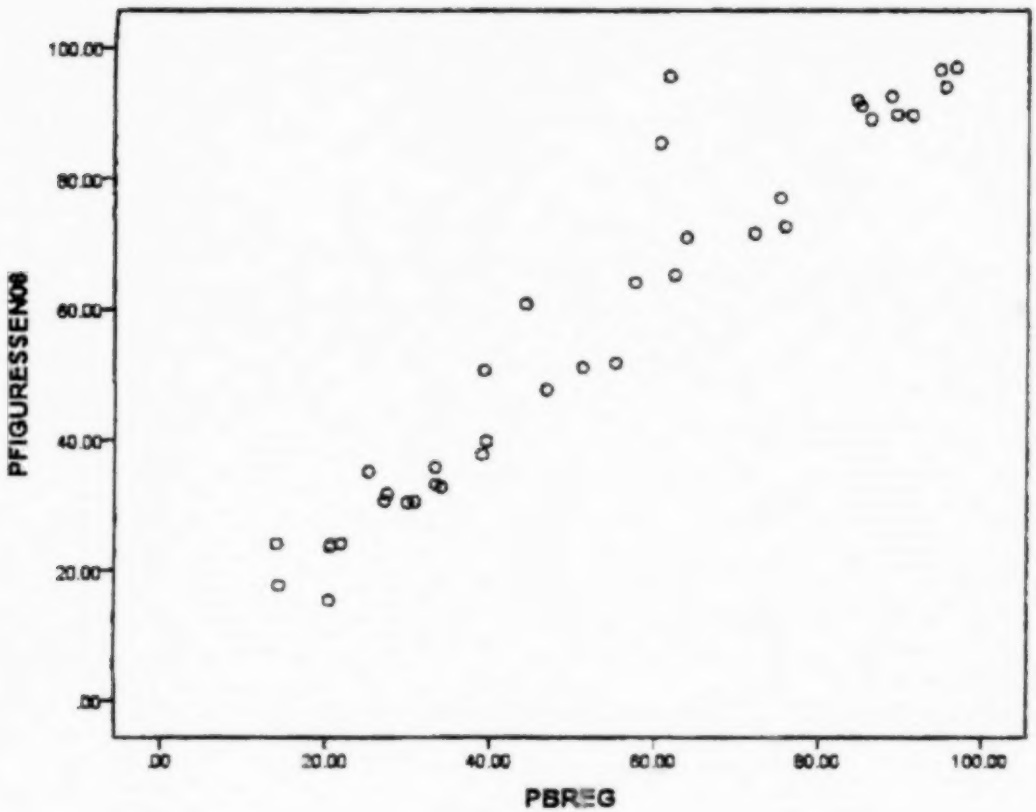


Chart Montgomery3: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

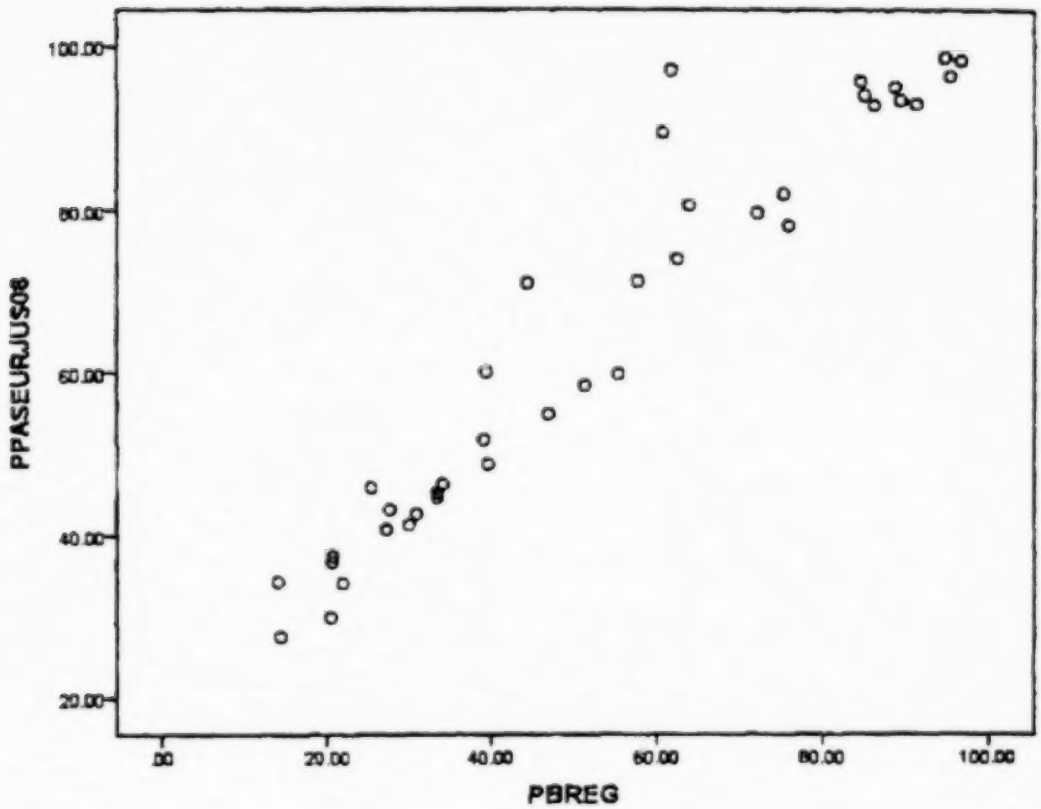


Chart Montgomery4: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

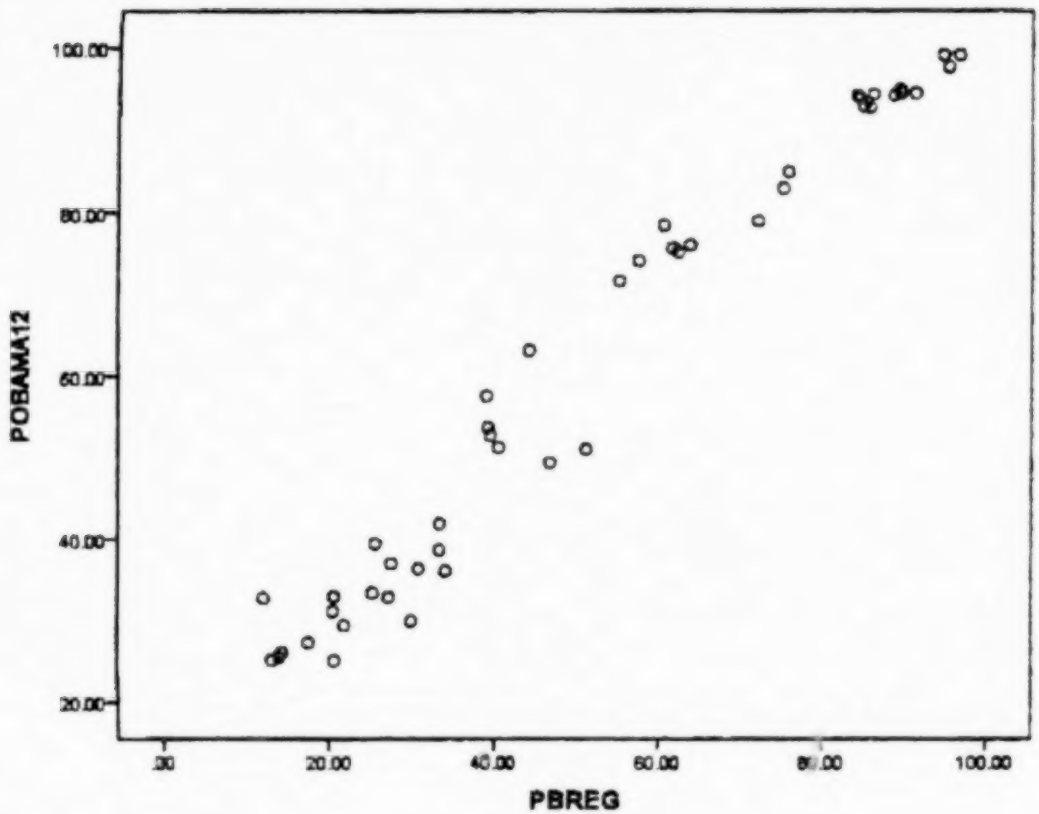
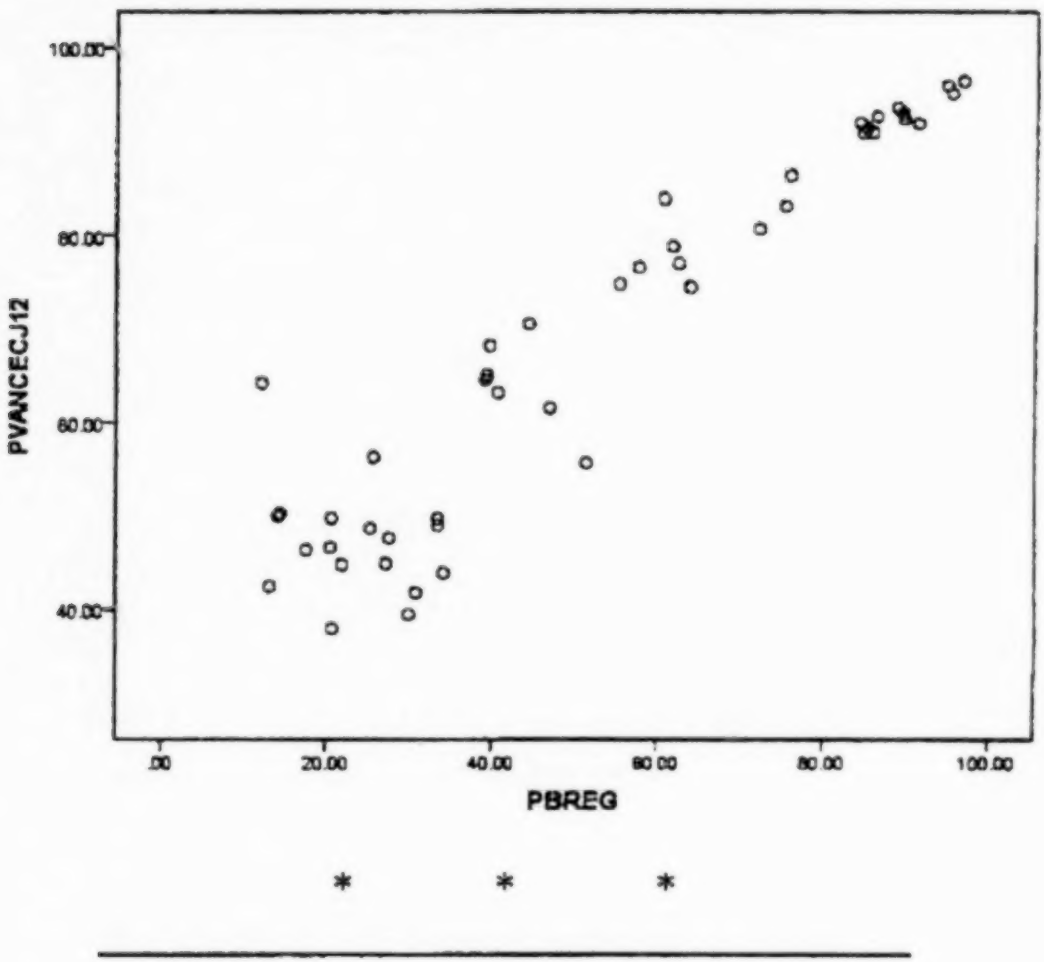


Chart Montgomery5: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General



LEGISLATIVE REDISTRICTING COMMITTEE

9th HEARING

OCTOBER 6, 2011

Birmingham, Alabama

APPEARANCES

SENATOR GERALD DIAL
REPRESENTATIVE JIM McCLENDON
SENATOR VIVIAN FIGURES
Dorman Walker, Hearing Officer
Balch & Bingham, LLP
105 Tallapoosa Street
Suite 200
Montgomery, Alabama 36104

Donna Armstrong, CCR #550
Certified Court Reporter

PROCEEDINGS

* * *

REPRESENTATIVE SCOTT: Thank you for that. And now I will make sure I go to the website and check. And there was one other point that Senator Dunn made, and that is the integrity of the current minority representation throughout the state based upon population.

Two particular, I guess, redistricting issues; one involving cracking, where you have a disbursement of minorities within the districts so that you, potentially,

lose any effectiveness in selecting minority representation.

And then, the other issue is one of packing, where you pack so many minorities in to one district that you create or you limit the number of representatives that can win – win seats in either the House or the Senate.

Do you have some plan to deal with those issues of cracking and packing?

MR. WALKER: Certainly. Certainly. Thank you. And that is a very good point.

The – as you know, any plan that is passed by the Legislature has to be submitted to the Attorney General

* * *

MR. WALKER: No. I'm sure – you have asked two questions: Has the Committee done any preliminary maps? And are there any plans being drawn? The answer to the first one is no. The answer to second one is I'm sure there are lots of people drawing maps, but I have not seen those. And I don't know – I don't know who drew that map, but no – no plan has been given to me to review, and I'm not aware of – neither Senator Dial or Representative McClendon has seen a proposed plan.

REPRESENTATIVE MERIKA COLEMAN: Okay. Well, then, when will – as there – you know, I'm going – because we are going on record and even if we have

to repeat things over and over again, I want to make sure that it goes on record, some of the same things. The packing and cracking I'm very concerned about.

MR. WALKER: Certainly.

REPRESENTATIVE MERIKA COLEMAN: And making sure we that we don't pack all African Americans in a geographic area – or a geographic districts in addition to cracking it up so much that there is no opportunity for a minority person to end up within their district. I want to go on record saying that. But also, as we consider districts, as some of my colleagues have already stated, trying to keep those cities intact.

* * *

ALABAMA LEGISLATURE

PERMANENT JOINT
LEGISLATIVE COMMITTEE

FOR REAPPORTIONMENT

IN RE: PUBLIC HEARING

OCTOBER 13, 2011 DEMOPOLIS, ALABAMA

PROCEEDINGS held in the above-styled cause, and moderated by the Honorable Dorman Walker, at the Demopolis City Civic Center, 501 North Commissioner Avenue, Demopolis, Alabama, on Thursday, October 13, 2011, commencing at 3:00 p.m.; and reported by Virginia Denese Barrett, Court Reporter and Commissioner for the State of Alabama at Large.

APPEARANCES:

AS HEARING OFFICER:

Mr. Dorman Walker
BALCH & BINGHAM, LLP
105 Tallapoosa Street, Suite 200
Montgomery, Alabama 36104.

COMMITTEE MEMBERS:

Senator Gerald Dial, District 13, Co-Chair
Representative Jim McClendon, District 50, Co-Chair
Senator Vivian Davis Figures, District 33, At Large

PROCEEDINGS

* * *

MR. ALBERT TURNER: I know you've got a six o'clock meeting in Tuscaloosa, and I ain't going to take all your time. But I just want to make sure that the other point is that this racial thing. We don't want these Republicans that's going to be in charge of the legislature to draw all these black people into six or seven districts and leave all these other thirty or twenty-nine senate districts to white Republicans or conservative white Democrats. We want to make sure that we have no race packing at all. And that is one of the criteria that the Department of Justice looks at, that there be no race packing.

* * *

LEGISLATIVE HEARINGS ON
REDISTRICTING LOCATIONS

TUSCALOOSA, ALABAMA

OCTOBER 13, 2011

IN RE: LEGISLATIVE HEARINGS ON REDISTRICTING:

Taken before Stone Arledge, ACCR# TL2019, on Thursday, October 13th, 2011, commencing at 6:33 p.m. at the Bryant Conference Center, 240 Paul Bryant Drive, Tuscaloosa, Alabama 35487.

COMMITTEE MEMBERS:
SENATOR GERALD ALLEN – DISTRICT 21
SENATOR VIVIAN FIGURES – DISTRICT 33
SENATOR GERALD DIAL – DISTRICT 13
REPRESENTATIVE JIM McCLENDON – DISTRICT 50

HEARING OFFICER: DORMAN WALKER

* * *

MR. WALKER: Well, you've – you've hit another area where there's a gradient instead of a guideline. In the past, it used to be 65 or 65 – above 65 – 60 percent. 65 was thought to be maybe the correct number, at least I remember in 1990, on the belief that – which was brought out by the evidence that minority communities had less of [an] ability to get to the polls and lower turnout; therefore, in order to make it an effective majority, black or other minority district, you needed to have a higher level. I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they

would wonder why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

* * *

ALABAMA LEGISLATURE PERMANENT JOINT LEGISLATIVE COMMISSION ON REAPPORTIONMENT LEGISLATIVE REAPPORTIONMENT COMMITTEE

20TH HEARING

SELMA, ALABAMA

SENATOR SANDERS: One of many concerns is we are not to have any less African-American – the majority African-American districts than you have, and that those districts ought not be less than 62 percent. And I want to say why 62 percent, ought not to be less than 62 percent. Many times a population of a district isn't reflective of the voters at all in that district. Sometimes a lot of people don't vote. Sometimes a lot of people can't vote. They might be in prison or other kinds of institutions. Sometimes a lot of folks are discouraged for one reason or another. So I would hope that 62 percent is a minimal for the majority African-American district. Second, I would hope that there's not packing.

* * *

(Doc. 30-28, Ex. C-21, p. 6)

ALABAMA LEGISLATURE PERMANENT
JOINT LEGISLATIVE
COMMITTEE FOR REAPPORTIONMENT
IN RE PUBLIC HEARING
OCTOBER 13, 2011
THOMASVILLE, ALABAMA

REPRESENTATIVE JACKSON: Even in that process, I understand that. But as we tried to amend those bills on the floor of the House and, you know, nothing is accepted, no amendments was – you know, I kind of feel like this is the same way that these House and Senate districts is going to be done. And I have a commonality in my district. We – people – I know they've compacted those districts, put the minorities in one district they could put them in, but we didn't feel that that was fair. Let me say even in my district, having five counties – and they're all rural counties from Choctaw all the way over to Conecuh moving from Marengo and Monroe – and I wanted some – you know, some continuity in that process. And I would like to see what's going to become of this district even with those new numbers. So I am very concerned about that. You know, and having a minority district over there, it's got to be ninety-nine percent minority.

HEARING OFFICER: Right.

REPRESENTATIVE JACKSON: It could be sixty-two percent or sixty-five percent. That's what

we're trying to [illegible] our good friends before on that. Nobody listens too well to us.

(Doc. 30-23, Ex. C-16, p. 8)

* * *

MR. DOUGLAS: My name is Thamus Douglas. I'm a member of the Clarke County Board of Education representing District 4.

HEARING OFFICER: Thank you, Mr. Douglas.

MR. DOUGLAS: I understand that because of the economy in our area, that our minority population are migrating north. And if we kept the counties together, it would be nice. But if we kept the counties together, we would lose our minority representatives. And I feel like that you-all need to zone it so that we can have a voice in our government. And I'm through.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al. **Plaintiffs** **v.** **THE STATE OF ALABAMA, et al.** **Defendants**	**2:12-CV-00691-WKW-MHT-WHP (Three Judge Court)**
DEMETRIUS NEWTON, et al. **Plaintiffs** **vs.** **STATE OF ALABAMA, et al.** **Defendants**	**2:12-CV-01081-WKW-MHT-WHP (Three Judge Court)**

AMENDMENT TO JOINT STIPULATION OF FACTS

(Filed Aug. 13, 2013)

Come now the parties to these consolidated actions and in compliance with the Court's Order on PreTrial Hearing, Doc. 153 at 4, and files this Amendment to the previously filed Corrected Joint Stipulation of Facts to stipulate the following:

19. Newton Plaintiff Stacey Stallworth is an adult, African-American citizen who is a registered voter of Montgomery County. Under the former house plan, Stallworth voted in HD 73, which is represented by Joe Hubbard, a white Democrat. Under the State's proposed plan, Stallworth will vote in HD 77, which is represented by John Knight, an African-American Democrat.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al. Plaintiffs v. **THE STATE OF ALABAMA, et al.** Defendants	**2:12-CV-00691-WKW-MHT-WHP (Three Judge Court)**
DEMETRIUS NEWTON, et al. Plaintiffs vs. **STATE OF ALABAMA, et al.** Defendants	**2:12-CV-01081-WKW-MHT-WHP (Three Judge Court)**

AFFIDAVIT OF JOE L. REED

(Filed Jul. 11, 2013)

STATE OF ALABAMA)

COUNTY OF MONTGOMERY)

COMES NOW before me, a notary public in and for said county and said State and, being first duly sworn, deposes and states:

1. My name is Joe L. Reed. I am over the age of 21 years, have personal knowledge of the facts set forth, and am competent to testify regarding them.

2. I am the President/Chairman of the Alabama Democratic Conference (hereinafter referred to as the "ADC").

3. The mission of the ADC is simple. It is to "organize" and to "unify" the vote of the African American population and also to make the African American vote and opinion appreciated and respected.

4. The ADC focuses on voter registration drives, monitoring voting, employing African Americans, and helping African Americans to be able to run for office and to hold high positions.

5. The ADC uses its funds and resources to educate voters for Get Out the Vote efforts, to endorse political candidates of all races for elected and appointed offices, to lobby for and against legislation, to sponsor reapportionment plans statewide, to support lawsuits dealing with political matters and elections, and to organize and educate voters regarding political issues relevant to the organization's purpose.

6. The ADC has members in nearly every county in the State of Alabama, including Calhoun County, Coosa County, Elmore County, and Talladega County.

7. As a result of the State's redistricting efforts in 2012, the excessive division of counties and voting precincts will create many unnecessary problems for candidates and voters, and these problems will fall most heavily on minority voters.

8. It is sometimes essential to split counties and precincts to comply with legal requirements, but there is a strong governmental interest in minimizing the number of counties and precincts split, especially from the perspective of minority voters and candidates. The division of existing voting precincts by district lines will, of course, necessitate the realignment of precinct boundaries and the reassignment of voters to new precincts. The process of reassigning voters will require considerable effort by the Boards of Registrars. Many of the Boards of Registrars, in my experience, lack technical skills.

9. The precinct splits also are likely to require a number of additional polling places. Locating and securing accessible sites with appropriate space and parking will involve time and resources on the part of county government, and we can no longer count on Section 5 to make sure the new polling places are not discriminatory.

10. The problems for the counties are less serious compared to the problems for voters who will need to be notified. Reassignment of voters to new precincts can, in the nature of things, result in mistakes: voters may be assigned to the wrong precinct. That has been the case in the past. Voters also must

learn of their new polling place assignments. That in turn requires knowledge that the polling place assignments have been changed or may have been changed, and the ability to ascertain the correct new assignment. Voters who lack internet access or lack reading skills – disproportionately minority voters – are at a severe disadvantage. Voters must actually get to the new polling places as well, which may be in an unfamiliar neighborhood. A disproportionate number of minority voters will not be able to navigate this process and will be discouraged from voting, or will go to the wrong polling location and lack the time, energy and resources to get to the correct site to cast a ballot.

11. As a practical matter, many minority voters rely on political campaigns and organizations to get such election information, and also to obtain rides to the polls. The changes flowing from the precinct splits will divert time and resources from minority campaigns and organizations like the ADC, which is already at a severe financial disadvantage. To make things worse, the Legislature has taken steps to defund black political organizations like the ADC by cutting off funds from sources like the Democratic Party, unions, and advocacy groups through the ban on transfers to the ADC via political action committees (PACs), and by its attacks on the AEA. Consequently, the ADC's resources and personnel will be undoubtedly be stretched thin to the point that they will not be able to meet increased demands, resulting

in a disproportionate number of minority citizens being able to vote.

12. The House and Senate plans increase the problems for minority voters, campaigns and organizations by the way the new district lines split many counties. Many of the county splits are unnecessary, and the House and Senate plans redraw a number of minority districts in a very irregular, contorted manner. Organizations that provide rides to the polls or engage in other "Get Out the Vote" activities will have to reorganize or form new alliances with shifts to new House, Senate, Congressional, County Commission, etc. type assignments. The irregularity of district lines is an impediment to such campaign activities, and will further stretch limited minority resources. As a result, a disproportionate number of minority citizens will not be able to vote.

13. The need for voter education and organization activities will be extraordinary as well. The party primary elections will be held on Tuesday, March 4, 2014. In addition to the need to inform voters of changes in district and polling places, the State of Alabama has enacted a new voter identification law. Alabama has not finalized its procedures for implementing this plan and for notifying voters of the requirement. A new voter ID requirement will generate confusion, and an effective campaign will have to spend time and resources educating voters in a very short time. In Georgia it took two years and a major publicity campaign.

14. The ADC is particularly concerned with the special difficulty of assisting voters who cannot read or who rely on Spanish translations. The state has no procedures for publicizing election information in Spanish or in any Asian languages. These citizens face unremitting hostility from state and local officials and regularly require assistance in voting.

15. Ultimately, some boundary changes are necessary. Some counties and precincts have to be split to comply with federal requirements. However, there is no federal law requirement that to split other counties that the House and Senate plans fracture. The State's plans go far beyond what is necessary and they split counties and precincts in ways that are unnecessary and illogical.

16. The State's House and Senate plans will disrupt existing minority political channels and systems, and add to the financial costs of minority candidates and others supporting minority participation in the new districts. Aside from the problems that the plan creates in terms of the opportunity of minority voters to elect candidates of their choice to the Legislature, the plans place new burdens on minority voters and make it harder for them to vote. As a result of these plans, many minority citizens will be unable to cast ballots in the 2014 elections.

FURTHER AFFIANT SAYETH NOT

/s/ Joe L. Reed
JOE L. REED

SWORN TO and SUBSCRIBED to this 9th of July, 2013

/s/ Kathy Mashan
NOTARY PUBIC

[My Commission expires 07/20/2013]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-691 WKW-MHT-WHP
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-1081 WKW-MHT-WHP

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO NEWTON PLAINTIFFS' CLAIMS

* * *

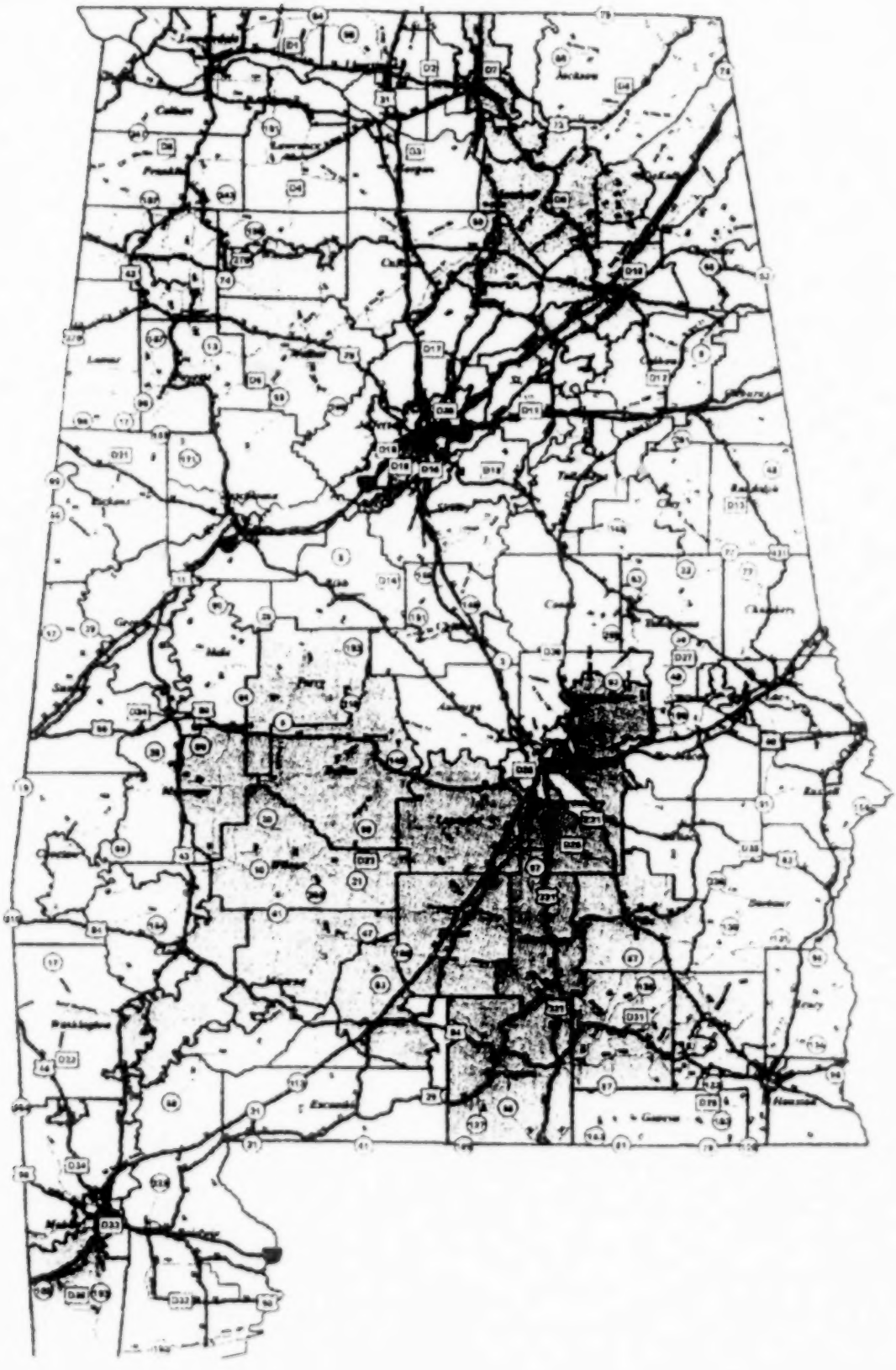
Newton Plaintiff Stacey Stallworth

197. Newton Plaintiff Stacey Stallworth lives in HD 73 in the 2001 House plan, which was represented by Joe Hubbard, a white Democrat. Exhibit P-7 at 7, lines 16-20.

198. In the 2012 House plan, Newton Plaintiff Stacey Stallworth will live in HD 77, which is represented by John Knight, an African-American Democrat. Exhibit P-7 at 11, line 20 through 12, line 2.

* * *

2014 Senate Districts



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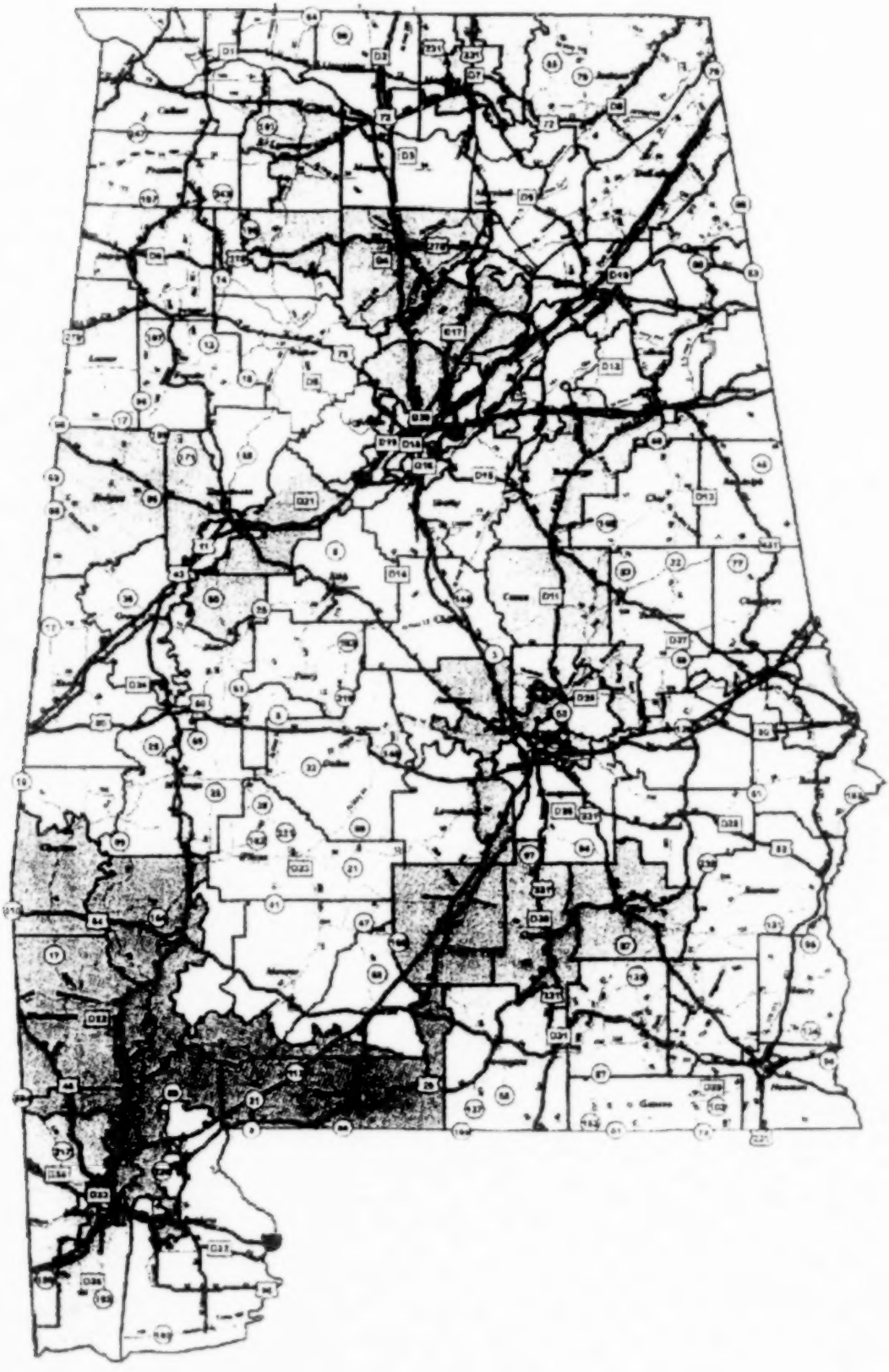

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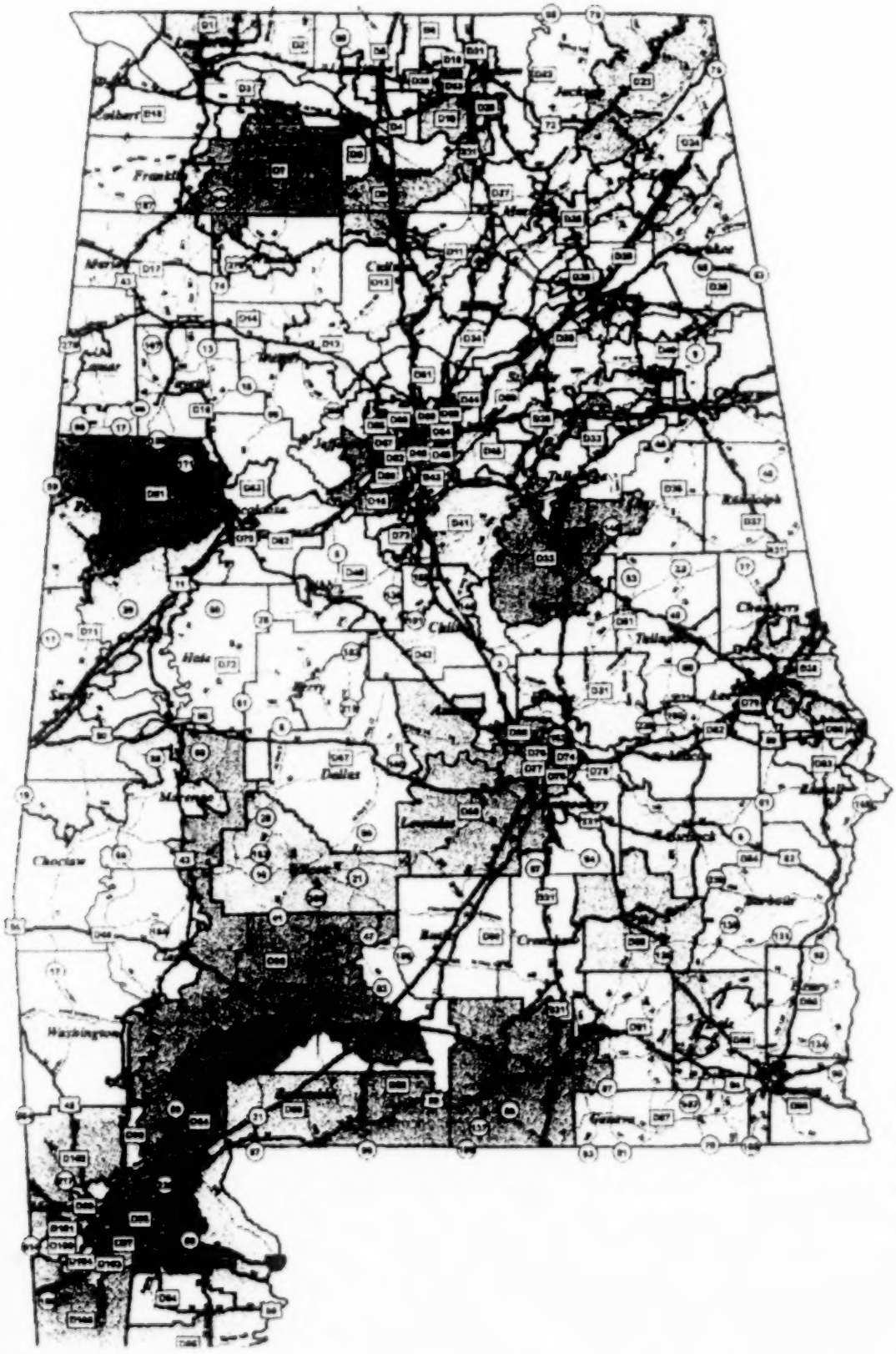

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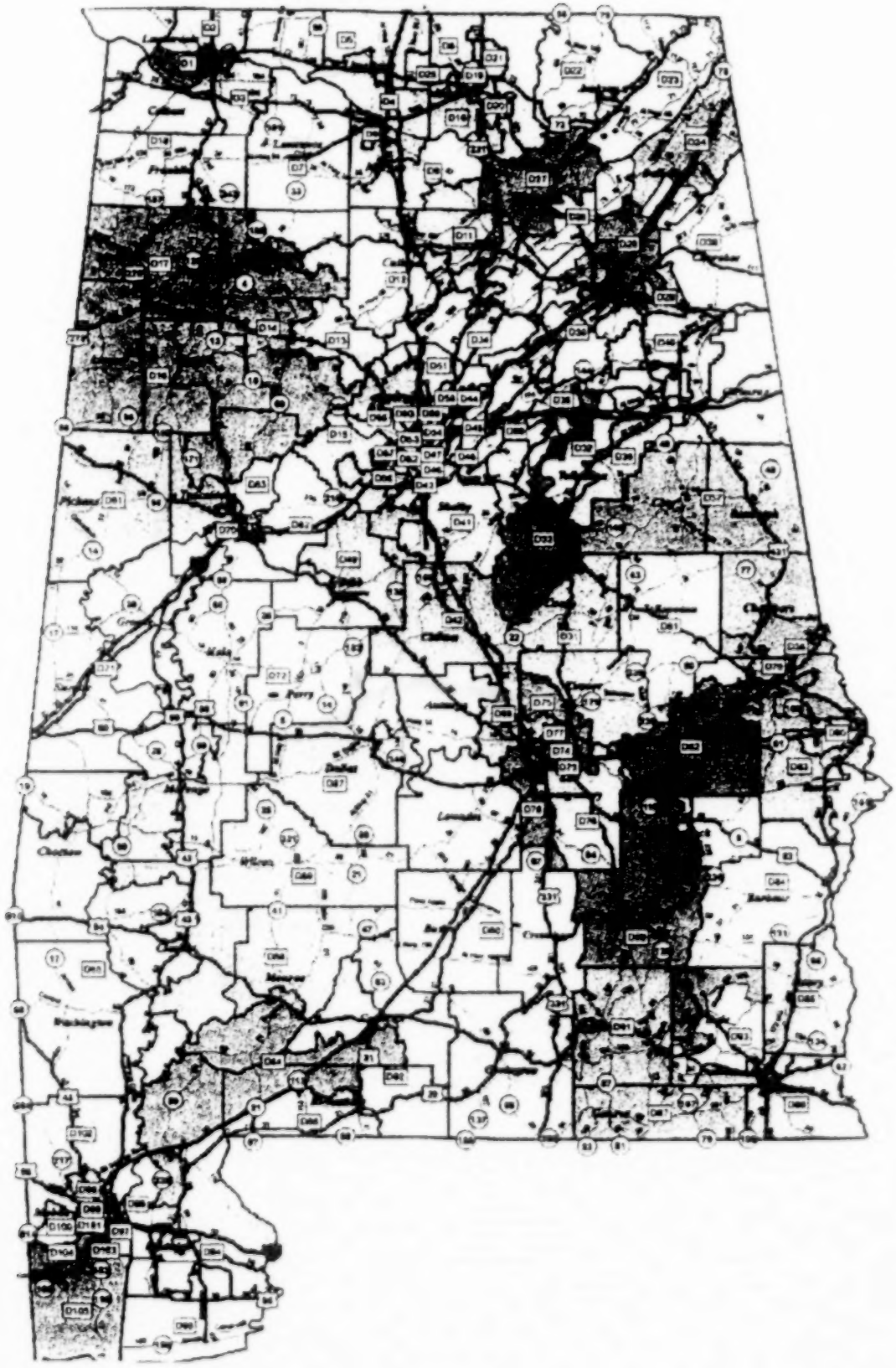

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JEFFERSON
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TUSCALOOSA
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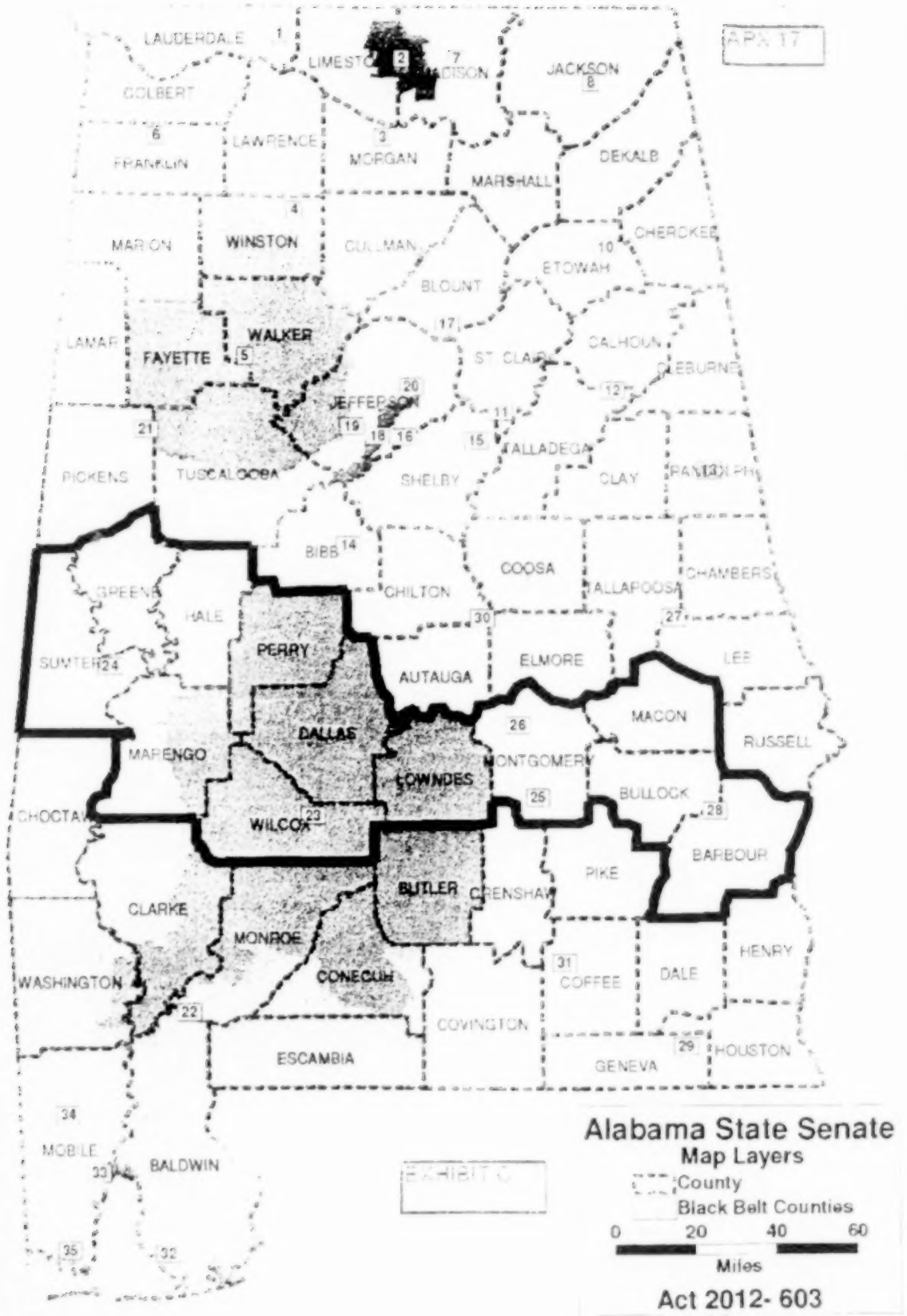
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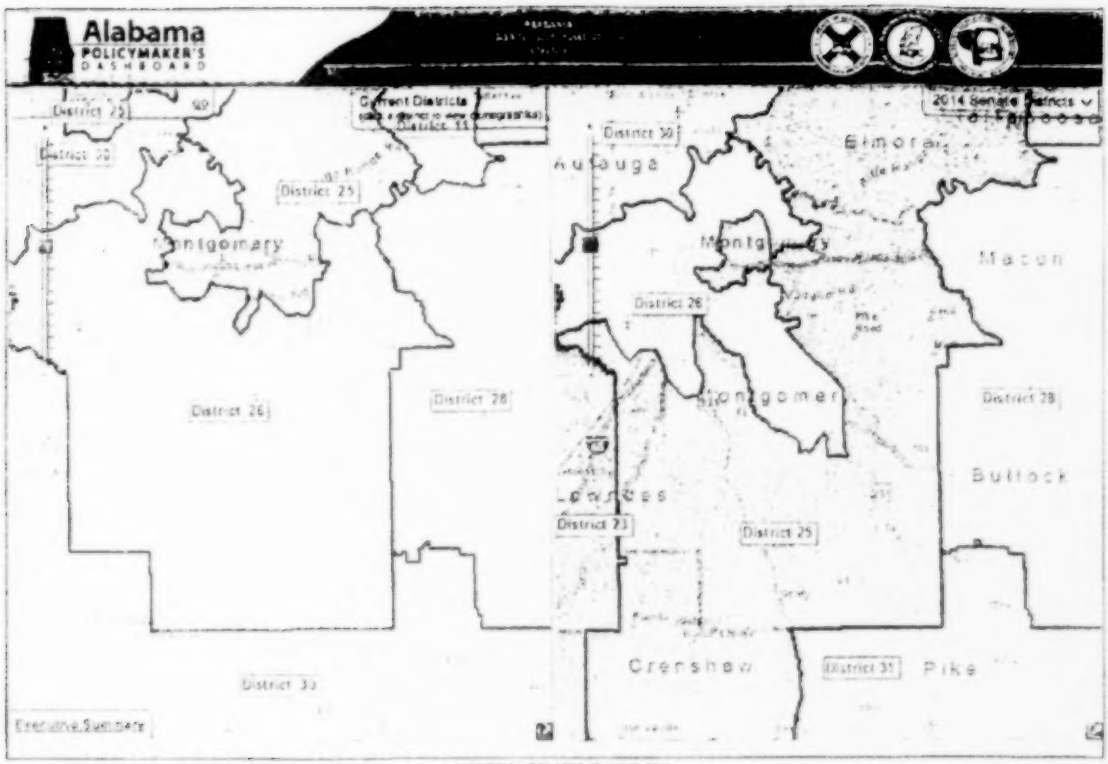

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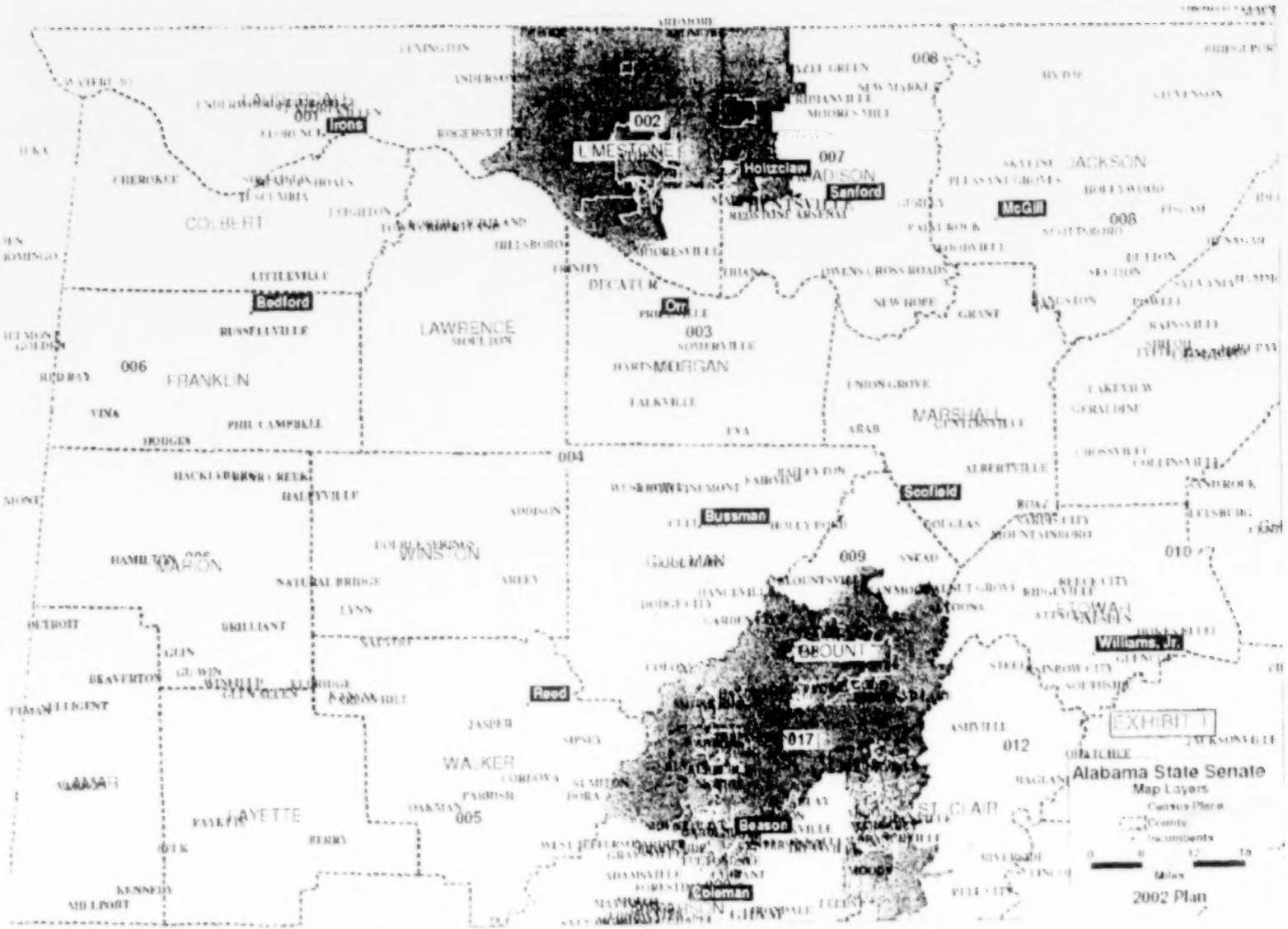
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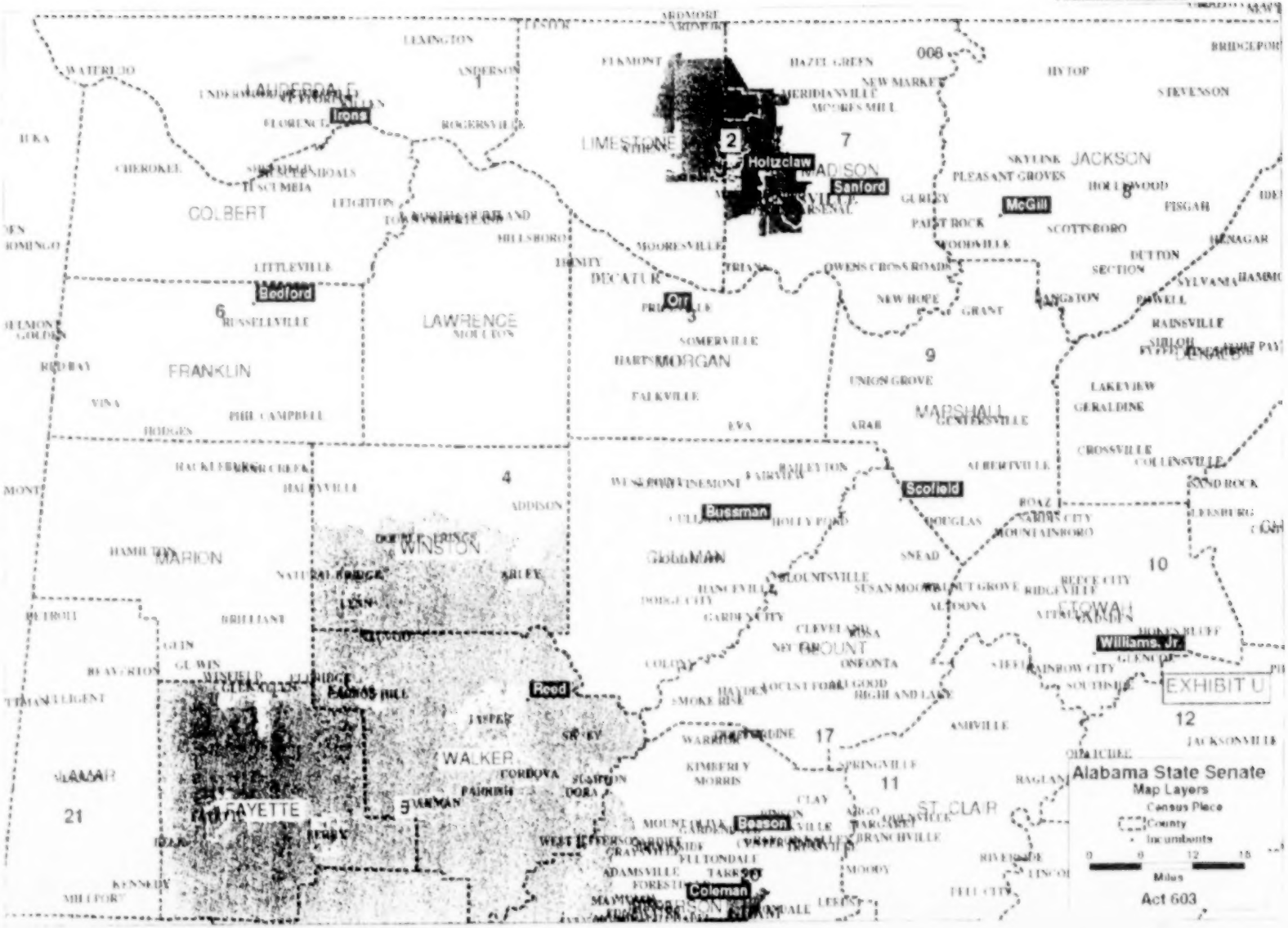
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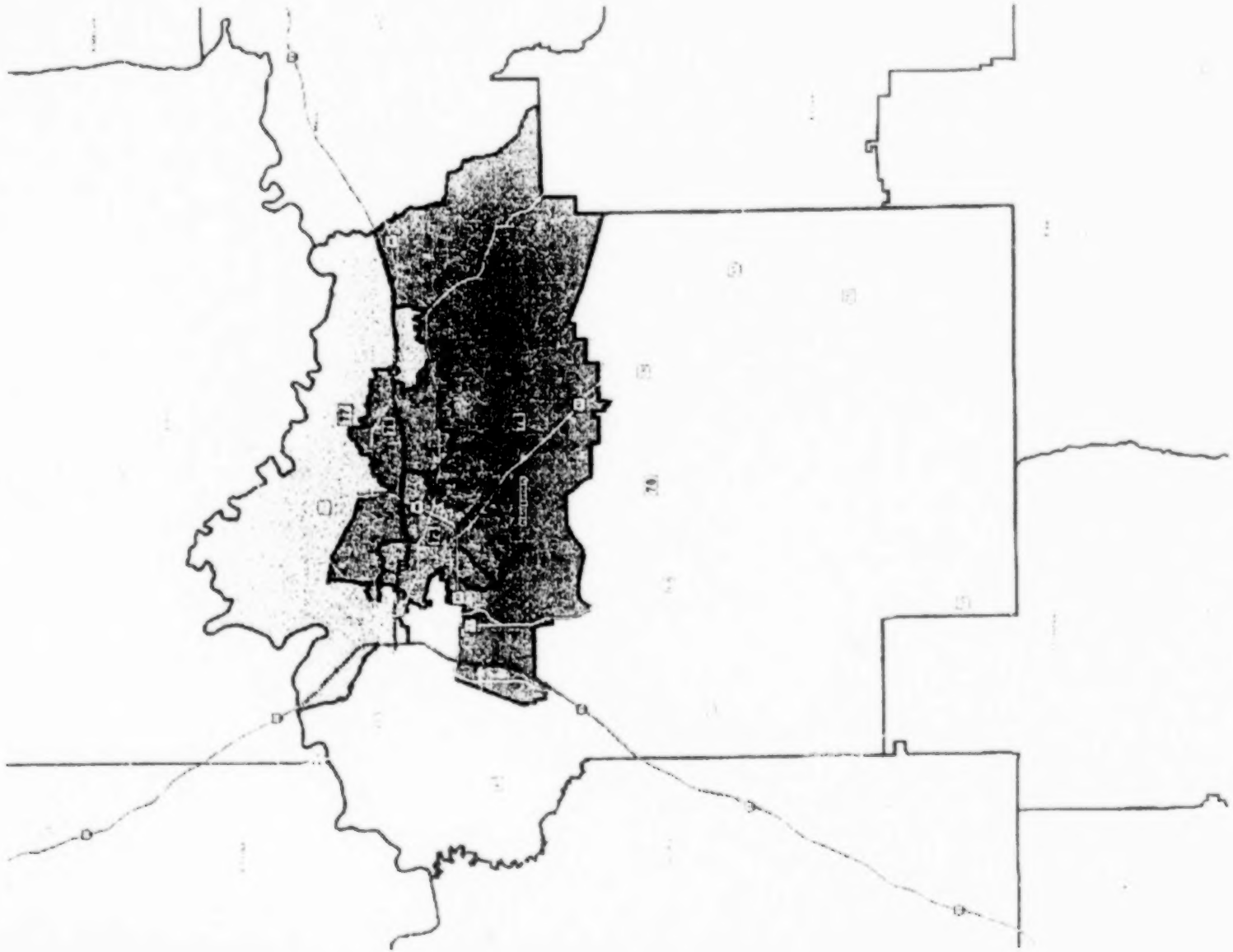

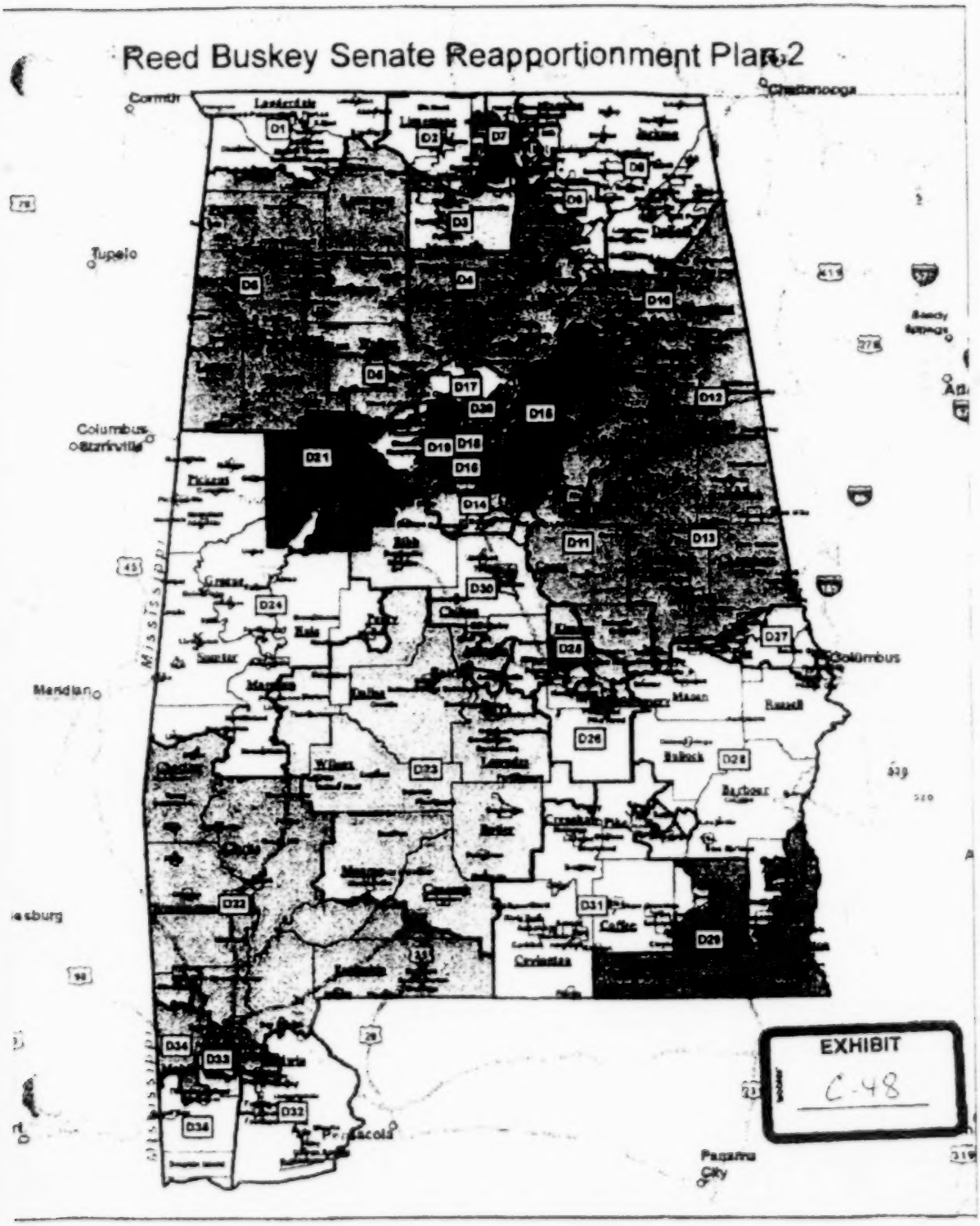
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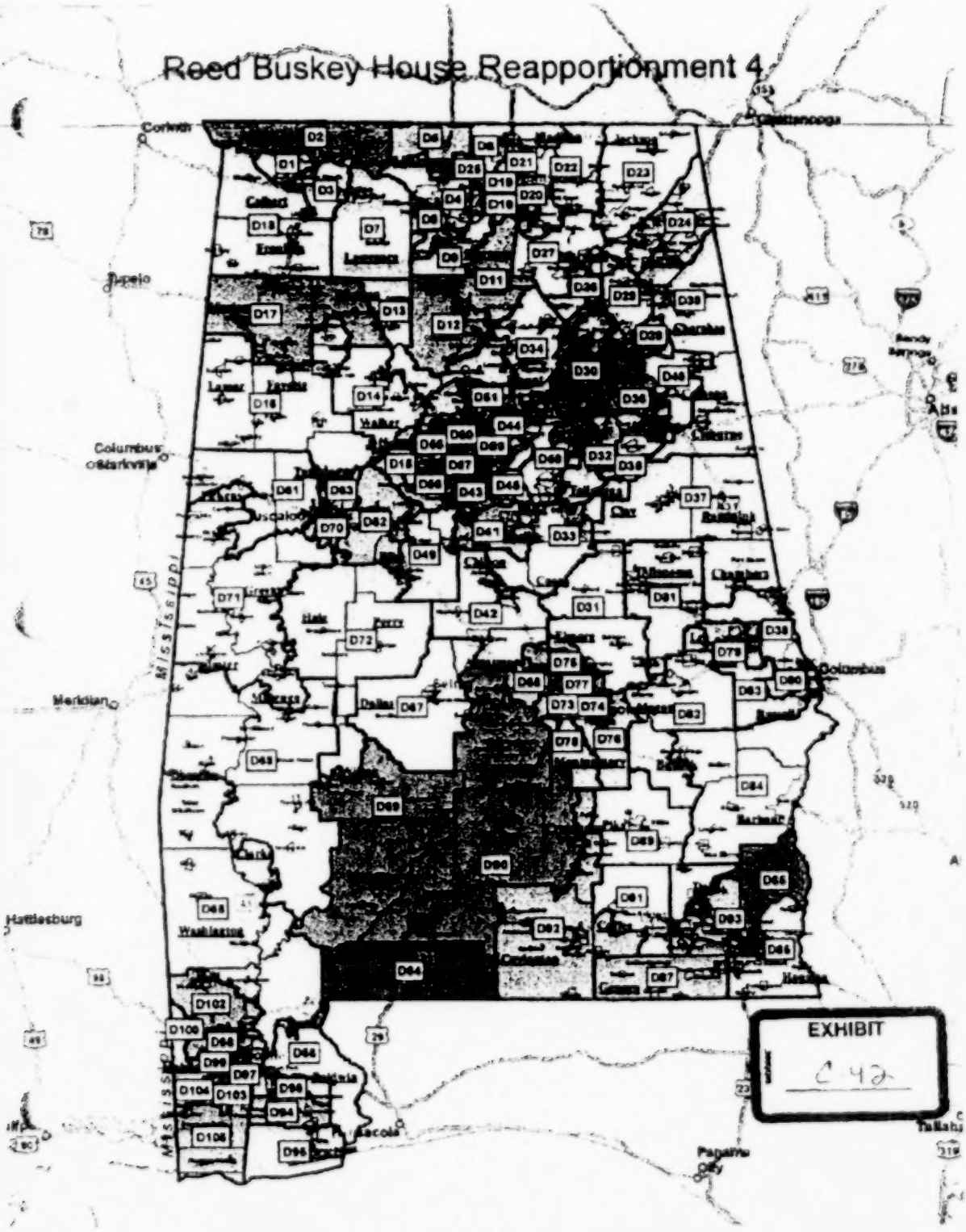

EXHIBIT

C-42

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, [v.] THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-691 WKW-MHT-WHP
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-1081 WKW-MHT-WHP

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO NEWTON PLAINTIFFS' CLAIMS

(Filed Jun. 17, 2013)

* * *

ARGUMENT

1. The Applicable Standard

In pertinent part, Federal Rule of Civil Procedure 56(a) states, "The court shall enter summary judgment

if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

2. The Alabama Democratic Conference lacks standing to pursue district-specific racial gerrymandering claims.[1]

In *United States v. Hays,* 515 U.S. 737, 115 S. Ct. 2431 (1995), the United States Supreme Court held that, in order to pursue a racial gerrymandering claim, one must live in the district at issue or otherwise show that he or she, personally, has been the subject of an invidious racial classification. The Court reasoned that, without such a showing, the claimant would be asserting only a generalized grievance that is insufficient to create standing. *Id.*, 515 U.S. at 743-45, 115 S. Ct. at 2435-37; see also *Lance v. Coffman,* 549 U.S. 437, 439, 127 S. Ct. 1194, 1996 (2007) (The Court has "consistently held" that a generalized injury is insufficient to create standing.).

Hays applies to the racial gerrymandering claims of the Alabama Democratic Conference. In Count II of their Complaint, the Newton Plaintiffs assert that the 2012 Alabama legislative redistricting plans are

---

[1] The Newton State Defendants note that the State of Alabama has been named as a defendant. That raises serious constitutional questions that this Court can avoid because full relief can be obtained through the official capacity defendant. This Court should dismiss the State as a party defendant for those reasons.

the product of unconstitutional racial gerrymandering. They do not distinguish between and among the individual plaintiffs and the Alabama Democratic Conference, which is characterized as "a statewide political caucus." Newton No. 1 at 4, ¶ 3. As an association, the Alabama Democratic Conference "lives" everywhere and nowhere, so any claim of racial gerrymandering that it makes is, necessarily, a general one that it lacks standing to make.

For that reason, this Court should dismiss the racial gerrymandering claim of the Alabama Democratic Conference.

3. The Newton Plaintiffs lack standing to pursue their challenge to SD 11.

In their Complaint, the Newton Plaintiffs point to, among other things, SD 11 as an alleged product of racial gerrymandering. Newton No. 1 at 16, ¶ 46f. None of the individual Newton Plaintiffs claims to live in SD 11 or alleges a specific injury with respect to SD 11. Accordingly, under *Hays,* the Newton Plaintiffs lack standing to bring this claim, and this Court lacks jurisdiction to consider it. *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734, 128 S. Ct. 2759, 2679 (2008) (internal citations and quotation marks omitted; alteration by the Court) ("[S]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought."). This Court should

disregard any suggestion that SD 11 is the product of unconstitutional racial gerrymandering

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, [v.] THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-691 WKW-MHT-WHP
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-1081 WKW-MHT-WHP

CONSOLIDATED REPLY BRIEF OF THE *NEWTON* STATE DEFENDANTS, SENATOR GERALD DIAL, AND REPRESENTATIVE JIM McCLENDON TO THE *NEWTON* PLAINTIFFS' RESPONSE

(Filed Jul. 18, 2013)

* * *

The *Newton* Plaintiffs' reliance on associational standing is unsound in this context. In *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333,

343, 97 S. Ct. 2434, 2441 (1977), the Supreme Court noted, "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." In this case, the claim asserted requires the participation of the individual ADC members. See *United States v. Hays,* 515 U.S. 737, 115 S. Ct. 2431 (1995)

United Food and Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544, 116 S. Ct. 1529 (1996), is not to the contrary. There, the Supreme Court held that a union could pursue a claim for backpay on behalf of its members under the Worker Adjustment and Retraining Notification Act. The Court resorted to general principles in concluding that the third prong of the associational standing test as asserted in that case was prudential.

No such resort to general principles is warranted in the redistricting context. The Court's decision in *Hays* is a specific holding regarding standing. If associational standing is allowed in this context, *Hays* will be a dead letter.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-cv-691-WKW-MHT-WHP (3-judge court)**
DEMETRIUS NEWTON, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-cv-1081-WKW-MHT-WHP**

Proposed Findings of Fact and Conclusions of Law

(Filed Aug. 21, 2013)

* * *

29. In order to pursue a racial gerrymandering claim, one must live in the district at issue or otherwise show that he or she, personally, is the subject of an invidious racial classification. *United States v. Hays,* 515 U.S. 737, 115 S. Ct. 2431 (1995). Without

such a showing, the claimant would be asserting only a generalized grievance which is insufficient to create standing.

30. No plaintiff who has suffered an actual, concrete, and particularized injury attributable to SD 11 has appeared. Any claims that relate or pertain in any way to SD 11 should be dismissed with prejudice for that reason.

* * *

ALABAMA LEGISLATURE
PERMANENT JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT

IN RE: PUBLIC HEARING

MAY 17, 2012

MONTGOMERY, ALABAMA

* * *

[11] SENATOR BEDFORD: Thank you very much, Chairmen, Ladies and Gentlemen, I thank you for bringing these maps to us. The first time y'all came to Fayette for a hearing and you heard that Fayette and Lamar County and Marion County wanted to stay together, you put them in four [12] separate Senate districts. So, they probably would have wiped you out or run you out of town on the rail, one.

Not only do I feel, in all due respect to the chairmen of the committee, that Senate – that Dial Plan Number 2 is racial gerrymandering and the dilution of black vote, but it totally destroys the community of interest in Northwest Alabama in two specific ways:

* * *

[15] UNIDENTIFIED SPEAKER: Hey, Mr. Chairmen, Mr. and Mr. Chairmen. I come up here today to challenge the McClendon and the Dial plan under Section 2 of the Voter's Right Act of 1965, as amended under T-73 and the 14th and 11th Amendments of the Constitution of the United States. These two acts violate the "One-Person, One-Vote" standard

set out and controlled by a Supreme Court case by arbitrarily and unnecessarily splitting the population with deviations so the public is nullified, thereby causing non-compliance for the whole county [16] requirement under the Alabama Constitution. These acts are racially gerrymandering and unnecessarily divide the population deviation and violates the whole county provision of the Alabama Constitution and have both the purpose and effect of minimizing and isolating our African-Americans from influence in the Alabama Legislature.

* * *

[27] REPRESENTATIVE COLEMAN: Thank you to the chairperson, the Committee, I am Representative Merika Coleman from Jefferson County, I just want to reiterate a couple of points. I have a problem with the two plan as it relates to packing and stacking of the African-American vote. What I have seen on many of the [28] redistricting plans, they have between 58 – maybe 52- to 73-percent African-Americans in a particular district, and we just don't need that. That is packing the minority votes in a specific area, where we really want to spread that out and have people of minority being all over the State of Alabama, just not in those African-American districts. So, I have an issue with the packing and stacking.

* * *

APPELLANT'S BRIEF

AMER
RECORDS
AND
BRIEFS

No. 13-895

FILED
AUG 13 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

v.

ALABAMA, *et al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

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Counsel for Appellants

**Counsel of Record*

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WWW.COCKLELEGALBRIEFS.COM

Library of Congress
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QUESTION PRESENTED

Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.

PARTIES

The plaintiffs in this action are the Alabama Legislative Black Caucus, the Alabama Association of Black County Officials, Bobby Singleton, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr. The defendants are the State of Alabama and Jim Bennett, Alabama Secretary of State. The intervenor-defendants are state Senator Gerald Dial and state Representative Jim McClendon.

In *Alabama Democratic Conference v. State of Alabama*, No. 13-1138, the plaintiffs are the Alabama Democratic Conference, Demetrius Newton (deceased), Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint, and Lynn Pettway. The defendants are the State of Alabama, Robert J. Bentley, Governor of Alabama, and Jim Bennett, Alabama Secretary of State. The intervenor-defendants are state Senator Gerald Dial and state Representative Jim McClendon.

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52 Fed.Reg. 486 (Jan. 6, 1987) 59

66 Fed.Reg. 5412 (Jan. 18, 2001) 59

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OPINIONS BELOW

The December 20, 2013 opinion of the district court, which is reported at 989 F.Supp.2d 1227 (M.D. Ala. 2013), is set out at J.S.App. 1-275. The August 2, 2013 opinion of the district court, which is reported at 988 F.Supp.2d 1285 (M.D. Ala. 2013), is set out at J.S.App. 278-407. The April 5, 2013, opinion of the district court, which is unofficially reported at 2013 WL 1397139 (M.D. Ala. April 5, 2013), reconsideration denied 988 F.Supp.2d 1285 (M.D. Ala. 2013), is set out at J.S.App. 408-36. The December 26, 2012, opinion of the district court, which is unofficially reported at 2012 WL 6706665 (M.D. Ala. Dec. 26, 2012), is set out at J.S.App. 437-53.

JURISDICTION

The final judgment denying all claims in these consolidated actions was entered on December 20, 2013. J.S.App. 276-77. The Alabama Legislative Black Caucus plaintiffs filed their notice of appeal on January 6, 2014. J.S.App. 454-57. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. This Court noted probable jurisdiction on June 2, 2014.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The statutes and constitutional provision involved are set out in an appendix to the brief.

STATEMENT

For much of the twentieth century there were no blacks in the Alabama Legislature. The first black members of the Alabama House in the modern era were elected in 1970, and the first black Senators in 1974. The number and boundaries of majority-black legislative districts have been a matter of controversy in Alabama throughout the ensuing decades.

Following the 1990 census, the Legislature failed to redistrict itself; new districts were ordered into effect by an Alabama court in 1993. *See Brooks v. Hobbie,* 631 So.2d 883, 884 (Ala. 1993). Under the 1993 court-ordered plan, there were 27 majority-black House districts ("HD") and 8 majority-black Senate districts ("SD"). Most of those districts had a total black population between 60% and 70% black. J.S.App. 47. The lowest black population was in HD 85, which was 51.13% black. In elections under the 1993 plan, black candidates were successful in all of these majority-black districts, including HD 85. Since 1993, candidates supported by black voters have been elected in all majority-black districts in Alabama. Most but not all of those successful candidates have been black; there are currently two white members of

the Alabama Legislature elected in majority-black districts.

The 2000 census revealed that the majority-black districts were all underpopulated.[1] Population shifts had reduced the total population in many of those districts,[2] and others had not grown as fast as the rest of the state. The Alabama Legislature, at that time controlled by Democrats, adopted a redistricting plan. Under that plan the black population percentage was reduced in all of the majority-black Senate districts, and in 22 of the 27 majority-black House districts.[3] The 2001 plan reduced the average black population percentage[4] by 6.19% in the majority-black Senate districts and 5.05% in the majority-black House districts.[5] The largest reductions were in HD 57 (reduced by 19.648%) and HD 82 (reduced by 16.163%). HD 85 was reduced from 53.3% to 47.9% and SD 28 was reduced from 59.269% to 56.458%. The 2001 plan also created a new majority-black district, HD 84, which was only 52.4% black. J.S.App. 21-23. The black members of the legislature supported the plan, even though it substantially reduced the size of

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[1] State Defendants' Exhibit ("SDX") 407, 441.

[2] *Compare* SDX 407 and 411 *with* SDX 402 and 406.

[3] SDX 407, 411; Brief Appendix, pp. 8a-10a.

[4] We refer to the amount of change in the percentage of the black population by calculating the difference between the percentages under two plans, rather than by calculating the ratio, in percent, between the two percentages.

[5] *See* Brief Appendix pp. 8a-10a.

the black majorities in the all the Senate districts and almost all of the House districts. The state submitted these changes to the Department of Justice for pre-clearance under section 5 of the Voting Rights Act. The Department did not object to these reductions in the size of the black majorities in any of the affected districts. *See Montiel v. Davis,* 215 F.Supp.2d 1279, 1289 (S.D. Ala. 2002) (three-judge court) (Black, J., concurring).

Black candidates continued to be elected from HD 85 under the 2001 plan, even though now it was only a black-plurality district.[6] Candidates supported by black voters were also elected from HD 84 and SD 28, even though in both the black population was less than 60%, and actually declined over the next ten years.[7] During the decade following enactment of the 2001 plan, the black population fell below 60% in five other House districts,[8] and in a Senate district.[9] Candidates supported by the black voters nonetheless continued to win the elections in those districts. In HD 73, originally majority-white, the black population grew substantially; by 2010 HD 73 was a plurality-black district, with a population 48.55% black. APX 6;

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[6] Doc. 125-4, Alabama Legislative Black Caucus Exhibit ("APX") 67, McClendon dep., 121.

[7] By the 2010 census, HD 84 was only 50.67% black and SD 28 was only 51.05% black. APX 6; APX 7; J.A. 103-08.

[8] APX 6; J.A. 103-08 (House districts 32 (59.62%), 53 (55.71%), 54 (56.77%), 82 (57.18%) and 83 (57.03%)).

[9] APX 7; J.A. 107-08 (Senate district 18 (59.93%)).

J.A. 105. In 2010 the candidate supported by black voters in HD 73 defeated the incumbent in the general election.[10]

The 2010 census[11] revealed that the majority-black districts were all underpopulated. This was due to a decline in the population in some districts, and slow growth of the population in others.[12] The majority-black Senate districts on average were underpopulated by about 15%, and the average majority-black House district was underpopulated by about 16%. J.S.App. 47-48.[13] The minimum number of additional people who would have to be added to each district turned in part on how much the Legislature decided to permit a district to depart from the ideal size. In

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[10] Newton Plaintiffs' (Alabama Democratic Conference) Exhibit ("NPX") 324 at 25; Tr. v. 3, at 39.

[11] There is a minor difference in the manner in which the Department of Justice and certain Alabama calculations in this case determined from the 2010 census whether to treat an individual as black, due to several subcategories in the census data. Those differences are not material to the resolution of this case, but they give rise to some minor discrepancies in the data.

[12] The majority opinion suggests that these districts were underpopulated in 2010 largely if not exclusively because in 2001 the Democratic controlled Legislature had deliberately underpopulated these districts as part of a partisan gerrymander. J.S.App. 4-7, 18-20. Whatever the motives of the 2001 Legislature, its plan clearly was not the primary cause of the underpopulation that existed by the 2010 census. Under the 2001 plan, the average majority-black district was underpopulated by less than 2.5%. *See* J.S.App. 54-56.

[13] The average underpopulation can be calculated from the tables on these pages.

prior redistricting, Alabama had required districts to be within 5% of the size of an ideal district. In designing the post-2010 census districting plan, however, the framers decided instead to permit a deviation of only 1%. That decision significantly increased the number of additional individuals who would have to be added to an underpopulated district. To bring the majority-black districts to within 1% of the ideal size, the new districting plan had to add about 20,000 persons to the average majority-black Senate district and about 6,000 persons to the average majority-black House district. The central controversy in this appeal concerns the method that was used by the Alabama Legislature in selecting the individuals to be moved into the majority-black districts.

In 2012 the Legislature was now controlled by the Republicans, who had supermajorities in both the House and Senate. The framers of the 2012 districting plan chose to deal with the need to repopulate the majority-black districts in a manner very different from that used by the framers of the 2001 plan. In selecting the persons to be added to those majority-black districts, the 2012 plan – through a variety of stratagems described below – ensured that about 64% of those added to the majority-black districts would be black,[14] even though the total Alabama population outside those districts – the pool from which those

[14] *See* nn.16, 17, *infra*.

individuals was drawn – was only about 17% black.[15] In repopulating SD 26, the 2012 plan added 14,806 blacks and 36 whites. Over 121,000 blacks[16] were added to the majority-black House districts, about 20% of all blacks in Alabama who did not already live in a majority-black House district.[17] Over 105,000 blacks[18] were added to the majority-black Senate

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[15] Using the Senate figures described in n.18, *infra*, the 27 Senate districts that were not majority black had a total population of 3,856,004, of which 656,307 were black.

[16] APX 6 contains total and black populations for all the House districts. It sets out the total and black populations of 26 districts with a black voting age population in 2001; these omit HD 84, which only had a black voting age population plurality. When the data for HD 84 are added to the totals for the 2001 plan, those totals then refer to the same 27 majority-black districts in the totals for the 2012 plan. The 2012 plan increased the sum population of those 27 districts by 191,659, of which 121,790 (63.5%) were black. The numbers for both would be slightly higher if HD 85, which went from plurality-black to majority-black, were included.

[17] The 2012 plan added to the 27 majority-black House districts 121,790 of the 594,151 blacks who were not then living in those districts.

[18] APX 7 contains total and black populations for all the Senate districts. It sets out the total and black populations of 7 districts with a black voting age population in 2001; these omit SD 28, which only had a black voting age population plurality. When the data for SD 28 are added to the totals for the 2001 plan, those totals then refer to the same 8 majority-black districts in the totals for the 2012 plan. The 2012 plan increased the sum population of those 8 districts by 165,591, of which 107,298 (65.2%) were black.

districts, about 16% of all blacks who previously had been in other districts.[19] *See* J.S.App. 195-98, 231-32.[20]

In a majority of the new districts, the black population percentage actually went up compared to the population under the 2010 census in the 2001 plan districts. *See* Brief Appendix, pp. 5a-7a, *infra*. HD 59 rose from 67.04% black to 76.8% black. SD 33 increased from 64.89% black to 71.1% black. SD 28 increased from 51.05% black to 59.96% black. J.A. 17. The 2012 plan raised the percentage of the black population in many of the very districts whose black population percentage had been lowered by the 2001 plan.[21]

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[19] The 2012 plan added to the 8 majority-black Senate districts 105,298 blacks out of 656,307 who prior to that plan were not living in majority-black districts.

[20] In this portion of his opinion the dissenting judge describes the number of blacks who would have had to be added to the majority-black House and Senate districts if all of them had been 1% below the size of an ideal House and Senate district. All of those districts were somewhat larger than that.

[21] HD 59, lowered by 3.0% in 2001, was increased by 9.76% in 2012. HD 72, which was decreased by 17.16% in 2001, was increased by 5.02% in 2012. HD 72, which was decreased by 3.91% in 2001, was increased by 4.38% in 2012. HD 76, which was decreased by 4.44% in 2001, was increased by 4.34% in 2012.

Conversely, in 8 of the 11 districts in which blacks had been between 30% and 50% of the population, the plan reduced the black population to below 30%.[22]

House and Senate Districts 30% to 50% Black: Eliminated by the 2012 Plan[23]

District	*2001 Plan*	*2012 Plan*
HD 73	48.55%	10.5%
HD 45	36.01%	15.5%
SD 11	34.24%	15.30%
SD 7	32.49%	27.68%
HD 6	30.75%	16.9%
HD 61	30.58%	19.1%
HD 74	30.55%	24.7%
HD 38	30.24%	16.9%

Every black member of the Alabama Legislature voted against adoption of the 2012 plan.[24] Several had expressed concern at earlier hearings that the Republican majority might fashion a plan that packed blacks into the existing majority-black districts.[25]

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[22] "The district court expressly found that the need to equalize population and maintain the population of adjacent majority-black districts necessarily changed these 'opportunity' districts." Joint Motion to Affirm, No. 13-1138, 14.

[23] APX 6 and APX 7; J.A. 103-08.

[24] NPX 323 (Arrington) at Table 6.

[25] Doc. 30-25 (SDX 441) at 8-9 (Rep. England), Doc. 30-28 (SDX 444) (Sen. Sanders, Rep. Melton), Doc. 30-12 (SDX 433) at

(Continued on following page)

After a draft of the 2012 plan was made public, individual black Representatives and Senators offered alternative plans that had lower black populations in the districts.[26] Those proposals were all rejected; the framers of the 2012 plan candidly testified that they would not accept these proposals because they did not add enough blacks to the districts in question.[27] *See* J.S.App. 206. The black state Senator from Mobile expressly asked that the population to be added to her district come from white areas, insisting that she could and indeed wanted to represent white voters.[28] Her request, too, was rejected; the 2012 plan instead increased the proportion of blacks in her district.[29]

This action was commenced in 2012 by the Alabama Legislative Black Caucus, the Alabama Association of Black County Officials, one black Senator and five black members of county commissions. A

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6 (Rep. Scott), 8-9 (Rep. Coleman), Doc. 30-30 (SDX 466) at 25-27 (Rep. Coleman).

[26] *See* APX 20-23.

[27] Tr. v. 1, 75, 124, 133; Dial. dep., Doc. 125-3, APX 66, at 38-39.

[28] Tr. v. 2, at 46 ("on the floor of the senate. . . . [a]s we started debating, and I saw the percentages in my district, I asked for more white voters. I said I was very capable of representing white people. And they said that they couldn't go one way or the other. So I said, well, why can't you go . . . over the bay to Baldwin County? But one of the senators from that area didn't want me in their local delegation.").

[29] Senator Figures represents SD 33.

subsequent action was filed on behalf of the Alabama Democratic Conference and other individuals. Both proceedings were brought against the state of Alabama and one or more state officials. Because the complaints challenged the validity of a state districting plan, it was heard by a three-judge court. 28 U.S.C. § 2284. The Republican co-chairs of the Legislature's Redistricting Committee, Senator Gerald Dial and Representative Jim McClendon, intervened as defendants.

The complaints initially asserted two race-related claims. First, they alleged that the 2012 plan was adopted for the intentionally discriminatory purpose of diluting black votes, by packing black voters into the existing majority-black districts, in violation of the Equal Protection Clause of the Fourteenth Amendment. Second, the complaints contended that the 2012 plan had the effect of diluting black votes, in violation of section 2 of the Voting Rights Act. 42 U.S.C. § 1973.

In June of 2013 the plaintiffs took the deposition of Randy Hinaman, the political consultant who, working with Senator Dial and Representative McClendon, had created the disputed 2012 plan. Hinaman candidly explained that the framers of the 2012 plan had expressly sought whenever possible to fix the percentage of the black population in each district at a level no lower than it was in the 2001 districts after the 2010 census. Achieving that result required that the areas added to each district contain at least the same black percentage as the district to

which it was being joined. Hinaman insisted that section 5 of the Voting Rights Act required that the state redistrict in this manner. In the wake of Hinaman's deposition, the plaintiffs expanded their claims to include an argument that the 2012 plan was a racial gerrymander that violated *Shaw v. Reno,* 509 U.S. 630 (1993) (*"Shaw I"*).

Depositions of Dial and McClendon confirmed Hinaman's account of how the 2012 plan had been crafted; Dial and McClendon explained they had repopulated the majority-black districts in this manner because they believed they were required to do so by section 5. These accounts delineated four specific tactics that the framers had used to attempt to assure that each of the majority-black districts would have at least the black population percentage that existed under the 2001 lines after the 2010 census. First, in Montgomery County they dismembered HD 73 – the black plurality district – and used portions of it to add to the neighboring majority-black districts. As Hinaman put it, "District 73 was cannibalized if you will to repopulate [HDs] 77, 78, and 76."[30] *See* pp. 39-40, *infra.* Second, they cannibalized a majority-black district, HD 53, and used various parts of that district to add blacks to the eight remaining majority-black districts in Jefferson County.[31] *See* p. 38, *infra.* Third,

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[30] Doc. 134-4, APX 75, at 142.

[31] To avoid reducing the number of majority-black districts, the 2012 plan created a new majority-black district in Madison

(Continued on following page)

in deciding which areas to add to each majority-black district, Hinaman selected particular areas, precincts or census blocks so that the resulting district would, if possible, have a black population no lower in percentage than the 2001 district had after the 2010 census. Where necessary to achieve that result, Hinaman had extended districts into other counties and divided precincts on racial lines. *See* pp. 41-49, *infra*. Fourth, in at least one instance Hinaman removed white areas from an underpopulated majority-black district so that they could be replaced by black neighborhoods. *See* pp. 51-53, *infra*.

The case was tried before the three-judge court in August 2013. Regarding the plaintiffs' *Shaw* claims, there were no significant disputes about the manner in which Hinaman, Dial and McClendon had framed the 2012 plan. All three maintained that in light of section 5 they were obligated to replicate in the new districts, where possible, the same black population percentages that existed in the 2001 districts after the 2010 census. They gave similar accounts both of that purpose of the 2012 plan and of the specific race-conscious steps they had taken to assure that result. In the district court, the central issue was whether under this Court's decision in *Shaw* and its progeny those largely undisputed facts required strict scrutiny of the 2012 plan, and if so whether the state's race-conscious action could withstand strict scrutiny

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County, which was then assigned the number, HD 53, of the cannibalized district.

because it was required by section 5. Those remain the controlling legal issues in this Court.

SUMMARY OF ARGUMENT

(1) In 2012 Alabama redistricted its House and Senate in a manner that systematically transferred into the state's majority-black districts a significant portion of the black population which previously had been in majority-white districts. Approximately 122,000 blacks were moved into the existing majority-black House districts, representing about 20% of the state's black population that had been in white districts. Over 108,000 blacks were transferred into existing majority-black Senate districts. The redistricting increased the population of one House District by 14,806 blacks and only 36 whites. All of the black members of the Alabama Legislature voted against the plan.

The facts regarding the motives of the Legislature and the manner in which this large number of blacks was packed into already existing majority-black districts are largely undisputed. The district court erred in concluding that those facts did not constitute a violation of the Equal Protection principles articulated in *Shaw v. Reno* and its progeny.

(2) The central feature of the redistricting plan was the implementation of district-specific racial ratios to determine who would be added to each majority-black district. In the wake of the 2010

census, the majority-black House and Senate districts were all underpopulated, and substantial additional populations had to be added to each of those districts. The state decided that the black proportion of the population added to each majority-black district should equal or exceed the racial composition of the district in question under the 2001 plan after the 2010 census. The racial ratios thus determined varied from about 51% in one district to over 70% in several others.

The district court itself found, and the framers of the 2012 plan acknowledged, that the framers intended to "maintain the same relative percentages of black populations in the majority-black districts." Those state officials insisted they believed that section 5 of the Voting Rights Act required them to match the black population percentage in each majority-black district. The Legislature's written Guidelines directed that compliance with the Voting Rights Act be given "priority" over all traditional districting principles. Thus the achievement of the district-specific racial ratios was by definition the predominant purpose of the plan, the circumstance that establishes a *Shaw* claim.

The district court erred in holding that the predominant purpose of the plan was *instead* compliance with the constitutional requirement of one person, one vote. *Shaw* claims usually arise in the context of districts that are sufficiently similar in size that they present no separate constitutional issue under *Reynolds v. Sims,* 377 U.S. 533 (1964). If deliberate

compliance with one person, one vote could defeat a *Shaw* claim, *Shaw* would be virtually a dead letter. This Court has repeatedly found liability for a *Shaw* violation in cases where none of the districts was unconstitutionally malapportioned.

(3) Alabama implemented the district-specific minimum racial ratios with exactitude. In 13 of the House districts the black population percentage of the new district was within 0.71% of – and always above – the percentage in the old district under the 2010 census. In 7 of those districts the black population percentage was less than 0.1% higher than in the old district. That pattern was "unexplainable on grounds other than race." *Hunt v. Cromartie,* 526 U.S. 541, 546 (1999).

The state subordinated a number of important traditional districting principles to the requirement of achieving the district-specific minimum racial ratios. The Legislature's Guidelines identified keeping incumbents in separate districts, and preserving existing districts, as longstanding state districting principles. But the redistricting plan cannibalized two districts – one majority-black and one plurality-black – for the avowed purpose of distributing their black populations to other districts in order to meet the applicable racial ratios in the surviving districts. Abolition of those districts necessarily meant that their incumbent Representatives were placed in the same districts as other incumbents.

The Guidelines also directed that each House and Senate district should be composed of as few counties as possible. In Alabama redistricting that does not cross county lines is a matter of constitutional importance, because the state Constitution requires apportioning House and Senate seats among whole counties, and because county legislative delegations control all local laws for their respective counties. There was undisputed evidence that the framers of the 2012 plan, in order to achieve the racial ratios, repeatedly crafted districts that crossed county lines.

(4) The district court erred in holding that section 5 of the Voting Rights Act requires a covered jurisdiction to maintain the minority population percentage of every majority-minority district. A reduction in that percentage will not always affect the ability of members of a protected group to elect their preferred candidates of choice. The minority population in a district might be so high that a reduction would have no practical consequences.

The Department of Justice, which administers section 5, has maintained both before and after the 2006 amendments that whether a districting plan is retrogressive depends on a number of circumstances in addition to the change in the minority population percentage.

ARGUMENT

I. ACHIEVING THE DISTRICT-SPECIFIC MINIMUM RACIAL RATIOS WAS THE PREDOMINANT PURPOSE OF THE REDRAWN MAJORITY-BLACK DISTRICT LINES

A. The Governing Legal Standard

In a series of decisions beginning with *Shaw v. Reno*, this Court has recognized an Equal Protection claim where racial considerations were the "predominant" purpose of a district's boundaries or of a districting plan. *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (controlling issue is whether "race ... *predominantly* explains [the district's] boundaries") (emphasis in original); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) ("in this context, strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision"); *Bush v. Vera*, 517 U.S. 952, 959 (plurality opinion), 996 (Kennedy, J., concurring) ("ample evidence ... demonstrates the predominance of race in Texas' redistricting") (1996); *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 905, 907 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("[t]he plaintiff's burden is to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"); *Shaw v. Reno*, *supra*. Proof of such predominance serves two functions which inform the meaning of this element of a *Shaw* claim.

First, proof that race was the predominant purpose of a legislative district is necessary to establish a violation of the Equal Protection right recognized in *Shaw*. This Court has repeatedly explained that a *Shaw* claim requires more than proof that race was *a* consideration behind a redistricting plan. *Easley*, 532 U.S. at 241 (majority opinion), 266 n.8 (Thomas, J., dissenting). "The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Shaw II*, 517 U.S. at 905 (quoting *Miller*, 515 U.S. at 911, 915-16)). A *Shaw* claim is "analytically distinct," for example, from a claim that a districting scheme "has the purpose and effect of diluting racial group's voting strength." *Shaw I*, 509 U.S. at 649, 652.[32] In non-*Shaw* Equal Protection cases, the initial burden on a plaintiff is only to show that race was "a motivating factor," *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 319 U.S. 274, 287 (1977). *Shaw* requires more.

Second, *Shaw* holds that proof of a predominant racial motive establishes a cognizable injury that gives rise to standing. Outside of the context of a dilution claim, demonstrating the existence of individualized harm resulting from a districting plan may be hard, because "it will frequently be difficult to discern why a particular citizen was put in one district or another." *United States v. Hays*, 515 U.S. 737, 744 (1995). A plaintiff could not establish a cognizable

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[32] *E.g., Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *White v. Regester*, 412 U.S. 755, 765-666 (1973).

personal injury merely by showing that someone else had been added to (or removed from) his or her district on the basis of race.[33] But a districting plan whose predominant purpose is racial threatens distinct representational harms cognizable under the Fourteenth Amendment. *Hays,* 515 U.S. at 745; *Shaw I*, 509 U.S. at 648, 650.

Miller made clear that *Shaw* claims are not limited to districts which have a bizarre shape. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller,* 515 U.S. at 913. A plaintiff may establish the existence of such a predominant motive with other types of evidence. *Id.*

In the previous *Shaw* cases considered by this Court, there was often a dispute of fact as to whether the legislature at issue had considered race at all in crafting the districts in dispute. This case is different and simpler. The motives of the framers of the 2012 plan were candidly disclosed; the issue here is only

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[33] The deliberate creation of a majority-white or majority-black district would not, without more, bring about the type of cognizable injury recognized in *Shaw*. Absent a *Shaw* claim, a plaintiff challenging such a district would have to show some other type of injury, such as vote dilution.

whether those acknowledged purposes, and the actions to which they led, satisfy the predominance standard.

B. The Avowed Racial Purpose of The 2012 Plan

(1) The district court recognized the racial standard utilized by the Alabama Legislature in determining which persons should be added to the majority-black districts to increase their total population levels to within 1% of the ideal district size. Here, unlike in *Easley*, the state does not contend that the district lines were fashioned for partisan rather than racial reasons. To the contrary, state officials acknowledged, and the district court found, that the areas to be added to each majority-black district were selected to ensure that the black percentage in that district was at least as high as it had been in the 2001 district under the 2010 census. State officials maintained that section 5 of the Voting Rights Act required them to redistrict in that race-conscious manner, and the state's own guidelines mandated that the Voting Rights Act – thus interpreted – be given priority over all traditional districting principles, subject only to the requirement of one person, one vote.

The district court concluded that "[t]he Legislature preserved, where feasible, the existing majority-black districts and *maintained* the relative percentages of black voters in those majority-black districts."

J.S.App. 181-82 (emphasis added). The court pointed out that both Hinaman and Dial had described in that way the standard they used in drafting the plan. J.S.App. 100 (Dial testified that "the Committee tried to match the percentages of the total black population in majority-black districts to the percentages in the 2001 districts based on the 2010 census."), 151 ("Hinaman ... added enough contiguous black populations to maintain the same relative percentages of black populations in the majority-black districts.").

Dial explained that "We wanted to make sure [the majority-black districts] stayed as they were and ... that they grew into the same proportion of minorities that they originally had or as close to it as we could get it."[34] Hinaman agreed that "when it came to the percentages of an individual district, I wanted to get as close as possible or try to be as close as possible

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[34] Dial dep., APX 66, Doc. 125-3, at 17; *see id.* at 100 ("Q. . . . [Y]ou wanted to make sure that the percentage of total population of African-Americans in [the majority-black Senate districts] stayed the same? A. As close to it as possible"); tr. v. 1 at 54 ("Q. And to be clear, the retrogression standard that you applied required . . . that you maintain the black majority percentage, the level, the size of the black majorities, in those districts; is that correct? A. Yes, sir."), 79 ("if they grew in by population, they had to grow in the same percentage that they already have and not regress that district"), 94 ("Q. You've testified about how you were unwilling to lower the minority percentage in any district to avoid your view of what regressing was, retrogressing. A. That's correct."), 133 ("the minority districts . . . had to grow . . . in the same proportion of minorities that they already had.").

to the numbers that existed with the 2010 census put into the 2002 [sic] ma[p]."[35] McClendon explained that "we tried to look at the 2010 census, overlay it on the districts, and try not to change the percentages of the citizens, the black citizens."[36] In its motion to affirm in No. 13-1138, the state stated that "*one* of the Legislature's overall goals was to 'make sure that each black-majority district ... maintained its prior percentage of black population.' J.S. 18." (ADC Joint Motion to Affirm, at 20) (emphasis in original). At trial the state objected that plaintiffs' proposals to create an additional majority-black district would not "maintain prior population portions in minority districts."[37] This Court noted in *Hunt v. Cromartie* that "[o]utright admissions of impermissible racial motivations are infrequent...." 526 U.S. at 553. The state, to be sure, insists these racial motives were permissible; but their existence is uncontroverted.

The state sought to justify this systemic use of race by insisting that it was required by section 5 of

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[35] Hinaman dep., APX 75, Doc. 134-4, at 101; *see id.* tr. v. 3, 118 ("I tried where possible not to lower the total population of African American population in those minority majority districts"), 145 ("And then looking at 2010 census as applied to 2001 lines, whatever that number was. I tried to be as close to that as possible"), 163 ("I tried to draw those districts as close to the numbers as possible").

[36] Tr. v. 3 at 221.

[37] Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 73; *see id.* at 77 (plaintiffs failed to show new minority district could be created "without lowering the minority percentages in surrounding districts").

the Voting Rights Act. The district court stated that Dial, McClendon and Hinaman "understood that, under the Voting Rights Act, the ... new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census." J.S.App. 32-33. "Senator Dial, Representative McClendon, and Hinaman understood 'retrogression' under section 5 of the Voting Rights Act to mean ... a significant reduction in the percentage of blacks in the new [majority-black] districts as compared to the 2001 districts with the 2010 data." J.S.App. 33.[38] That is what Dial said he thought section 5 required the state to do. "Q. ... [W]as it your opinion that reducing the black percentages in the majority-black districts would violate the Voting Rights Act? A. Yes, sir."[39] A decrease of even a single percent in the proportion of the population that was black, Dial insisted, would have been impermissible.[40]

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[38] Dial testified that the Committee understood the Voting Rights Act "to require that it not reduce . . . the approximate levels of black population within [the majority-black] districts." J.S.App. 94.

[39] Dial dep., APX 66 Doc. 125-3, at 39-40.

[40] Dial dep., APX 66, at 81:

Q. So you did not want the population of African-Americans to drop in [SD 23]?

A. That's correct.

Q. Okay. And if that population dropped a percentage, in our opinion that would have been retrogression?

A. Yes, sir.

> Q. ... [I]f that [black] population dropped a percentage, in your opinion that would have been retrogression?
>
> A. That's correct.
>
> Q. ... [I]f Senator Sanders' district had been 65 percent African-American, and if it dropped to 62 percent African-American in total population, then that would have been retrogression to you?
>
> A. In my opinion, yes.
>
> Q. And so that's what you were trying to prevent?
>
> A. Yes.[41]

In this Court the state insists that "the drafters of Alabama's plans interpreted Section Five to require them to keep the percentages of minority voters roughly constant in the majority-minority districts...." Joint Motion to Affirm, No. 13-1138, at 8. The drafters' insistence that section 5 *required* them to maintain the black population percentage in each of the majority-black districts confirms that state officials used race in precisely that manner.

Under the Legislature's written Guidelines, that mistaken interpretation of section 5 automatically took priority over traditional districting principles.[42]

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[41] *Id.* at 81.

[42] The Department of Justice section 5 guidance makes clear that section 5 does not require a covered jurisdiction to

(Continued on following page)

The Guidelines set out a number of such principles, such as composing districts "of as few counties as practicable," compactness, avoiding contests between incumbents, not dividing precincts, and respecting the integrity of communities of interest.[43] But the Guidelines expressly provided that "priority is to be given to ... the Voting Rights Act...."[44] The district court pointed out that under the state's own standards "the 'first qualification' after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them." J.S.App. 149. "The guidelines acknowledged that not all of the redistricting goals could always be accomplished and provided that, in cases of conflict, priority would be given to the requirement of one person, one vote and to the requirements of the Voting Rights Act." J.S.App. 27-28. In this Court the state itself points out that "[t]he district court ... expressly credited the testimony of the plan's drafters that, after one-person one-vote, their next highest goal was to comply with the Voting Rights Act." Joint

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mechanically override in this manner its traditional districting criteria. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed.Reg. 7470, 7471-72 (Feb. 9, 2011).

[43] Doc. 30-4, at 3-4.

[44] *Id.* at 4 ("In establishing congressional and legislative districts, the Reapportionment Committee shall give due consideration to all the criteria herein. However, priority is to be given to the compelling state interests requiring equality of population among districts and the Voting Rights Act of 1965, as amended, should the requirements of those criteria conflict with any other criteria.").

Motion to Affirm, No. 13-1138, at 5. In light of the drafters' erroneous insistence that the Voting Rights Act mandated the maintenance of the black population percentages at the same levels that existed in majority-black districts under the 2001 lines after the 2010 census, adding enough blacks to each majority-black district to replicate that black percentage necessarily was in the framers' view a requirement that "could not be compromised." *Shaw II*, 517 U.S. at 907.

(2) The framers of the 2012 plan were committed to achieving the district-specific minimum racial ratios "if possible." But when the additional population available to repopulate an underpopulated district did not have a sufficiently large black population percentage to achieve that ratio, the framers had to use whatever population was available to satisfy one person, one vote.

The district court believed that this meant that one person, one vote – not the racial ratios – was the predominant motive under *Shaw*.

> We agree with our dissenting colleague that all districting principles were subordinated to a single consideration, but our dissenting colleague identifies the wrong one.... [T]he consistent testimony of Senator Dial, Representative McClendon, and Hinaman established that the constitutional requirement of one person, one vote trumped every other districting principle.... While accomplishing this primary task, Hinaman also tried to satisfy sections 2 and 5 of the Voting Rights

> Act. Our dissenting colleague discounts Hinaman's paramount commitment to population equality....

J.S.App. 151-52; *see id.* at 147-48.

But proof of a *Shaw* violation does not require a demonstration that racial purpose would also have predominated over complying with the constitutional limitations on the permissible deviation in district size. *Shaw* does not require a showing that the framers of a districting plan in order to achieve some racial purpose had *also* violated, or at least would have been willing to violate, the constitutional requirement of one person, one vote. *Shaw* claims usually arise in the context of districts that are sufficiently similar in size that they present no separate constitutional issue under *Reynolds v. Sims.* Those who draft districting plans virtually always begin with a commitment to crafting districts sufficiently similar in size to be constitutional. If that near universal priority were sufficient to defeat a *Shaw* claim, *Shaw* would be a dead letter.

This Court found constitutional violations in *Hunt v. Cromartie, Bush v. Vera,* and *Shaw v. Hunt.* None of these cases presented proof that the framers of the plan in question had violated one person, one vote, or that they would have done so if necessary to achieve the racial purpose in question. The legislative guidelines adopted by Georgia in *Miller* "required single-member districts of equal population." 515 U.S. at 906. In *Shaw II* the state unsuccessfully argued that race was not the predominant motivating factor

because the framers of the district in question also had "an intention to meet one-person, one-vote requirements."[45] The dissenters in *Easley* did not suggest there was any evidence in that case of a violation of, or willingness to violate, the requirement of one person, one vote. 532 U.S. at 259-66.

The *Shaw* requirement that a racial purpose have predominated over traditional districting principles refers to districting criteria other than a state's effort to comply with the constitutional principle of population equality. *See Miller*, 515 U.S. at 916 ("compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests"); *Bush v. Vera*, 517 U.S. at 962 ("compactness"); *Shaw I*, 509 U.S. at 647 ("compactness, contiguity, and respect for political subdivisions").

C. The Subordination of Traditional Districting Criteria

The drafters' determination to maintain the existing black percentage in all of the majority-black districts meant that they had to achieve a different minimum racial ratio in each district. That district-specific minimum racial ratio varied from 50.61% in HD 84 to several House and Senate districts above 70%.[46] Insuring that as many districts as possible

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[45] State Appellees' Brief, *Shaw v. Hunt*, at 34, available at 1995 WL 632461.

[46] APX 6; J.A. 103-06.

were above these various district-specific racial ratios was of controlling and pervasive importance in the framing of the 2012 plan.

(1) The drafters implemented with painstaking exactitude their determination to repopulate the majority-black districts, where possible, so that the black population percentage did not decrease.

Change in Black Population Percentage 2001 and 2012 Plans Under 2010 Census[47]

District	*2001 Plan*	*2012 Plan*	*Difference*
HD 55	73.55%	73.55%	0
HD 97	60.66%	60.66%	0
HD 56	62.13%	62.14%	+ .01%
HD 67	69.14%	69.15%	+ .01%
HD 52	60.11%	60.13%	+ .02%
HD 57	68.42%	68.47%	+ .05%
HD 69	64.16%	64.21%	+ .05%
HD 54	56.73%	56.83%	+ .10%
HD 53	55.70%	55.83%	+ .13%
HD 70	61.83%	62.03%	+ .20%
HD 60	67.41%	67.88%	+ .47%
HD 83	56.92%	57.52%	+ .60%
HD 32	59.34%	60.05%	+ .71%

[47] These data are set out at pp. 13-14 of the Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196. The percentage for HD 53 under the 2012 plan is in SDX 403, p. 5 col. 7.

In almost half of the majority-black House districts, the black population percentage changed less than .75%; in a quarter of them it changed by less than .1%. In every House district within this .71% range, the black population percentage either went up or stayed the same. There is virtually no change in the percentage in the district denoted House District 53, despite the fact that the original HD 53 in Jefferson County was abolished and replaced by an entirely new district, with the same House District number, but located some 100 miles away in Madison County. The black population percentage also changed by less than 1% in three of the eight majority-black Senate districts.[48]

This pattern is assuredly "unexplainable on grounds other than race." *Hunt v. Cromartie*, 526 U.S. at 546 (quoting *Shaw I*, 509 U.S. at 644). In a single case, or even several instances, the racial composition of a new district might by chance be close to or even the same as that of its predecessor, but surely that could not occur by chance in such a large number of districts in a single redistricting plan. The state has never contended this was simply an extraordinary coincidence. The pattern makes clear that in each of these districts whatever traditional districting factors might otherwise have influenced the selection of areas to be added to a district were set aside in favor of adhering to the applicable district-specific minimum racial ratio.

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[48] SD 23 rose by .08%, SD 24 rose by .44%, and SD 18 fell by .82%. Doc. 196 at 12.

The dissenting judge below correctly remarked upon the "racial exactitude" of the manner in which those ratios were implemented. J.S.App. 230.

> In some districts, the rigidity of these quotas is on full display. HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came within two individuals of achieving the exact quota they set for the black population; these two people represent .004% of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071.

J.S.App. 208-09 (footnoted omitted).

In seven House districts[49] and three Senate districts[50] the black population percentage increased more than one percent. That was entirely consistent with the testimony of the drafters that they intended to create black majorities "at least" as great as had

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[49] HD 59 (+9.76%), HD 68 (+2.1%), HD 71 (+2.1%), HD 72 (+4.38%), HD 76 (+4.34%), HD 82 (+5.02%), and HD 84 (+1.73%). Brief Appendix, pp. 5a-6a.

[50] SD 26 (+2.47%), SD 28 (+8.91%), and SD 33 (+6.82%). Brief Appendix, p. 7a.

existed under the 2001 plan after the 2010 census.[51] In at least one of those districts there is evidence that the drafters systematically drew the lines to increase the black population percentage. (*See infra*, pp. 51-52). The district court commented that "the Legislature fairly balanced the *overall* percentages of the black voting-age population in the majority-black House districts" (J.S.App. 182) (emphasis added), so that the districts in which the black percentage increased balanced out the districts in which the Legislature had been unable to achieve the racial ratio. The comment suggests that the majority below believed that the drafters had deliberately added extra blacks to some districts to make up for the fact that it had not been possible to move into other majority-black districts enough blacks to achieve the district-specific minimum racial ratio for those particular districts.

(2) Hinaman, Dial and McClendon all testified that they had maintained the black population percentage whenever possible. Under the state Guidelines, the only criterion that was not subordinate to the Voting Rights Act (as they interpreted it) was the requirement of one person, one vote. Hinaman explained that sometimes when he needed to add population to a majority-black district, the black population percentage of the district unavoidably declined because

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[51] J.S.App. 148 ("I did not consider any [black percentage] too high, based on . . . the fact that the districts had to grow proportionately.") (quoting Senator Dial).

the proportion of blacks in the areas adjacent to that district was too low. "In some districts, it was obviously ... unavoidable because there was just not the African-American population to enter those districts. The black percentage was going to go down no matter what. So there were certain areas where you couldn't help but lower the percentage."[52] The only other explanation Hinaman (or anyone else) gave for lowering the black population percentage was to transfer blacks from HD 19 into the newly created majority-black HD 53.[53] "Hinaman never testified that he lowered the black percentage in any district for any other reason." J.S.App. 229 (dissenting opinion). The court below commented that the fact that the black percentage declined in some majority-black districts "supports the inference that Hinaman subordinated racial considerations to the guideline of an overall deviation in population of 2 percent." J.S.App. 150. That observation necessarily reflects the fact that the reason the district-specific minimum racial ratio was

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[52] Hinaman dep., Doc. 134-4, APX 75, at 102; *see* tr. v. 3, 162-63:

> Q. ... [Y]ou ... lowered House District 98 from 65.22 to 65.2. And House District 103 as well, didn't you?
>
> A. Sometimes there's no way to avoid it.

[53] Tr. v. 3, 162

> Q. Well, you lowered House District 19, which was 69.82 percent, to 61.25 percent. Correct?
>
> A. Yes, I did, but for the greater good of creating another African American majority district.

not achieved in some cases was that the available areas that could be used for the necessary repopulation of underpopulated majority-black districts simply did not have a large enough black population.

The district court commented that "[t]he legislature reduced the percentage of black persons in majority-black districts where necessary to achieve other objectives." J.S.App. 144. But the court below did not suggest that the "other objectives" included anything except assuring that the districts were of reasonably equal population, and in one instance creating a new majority-black district.

The district court understood that in framing the 2012 plans the drafters had sought to replicate the black population percentage that existed in the 2001 districts *after the 2010 census*.[54] Dial,[55] McClendon,[56] and Hinaman[57] all explained that benchmark with which they compared the new districts was the black population under the 2010 census in the 2001 districts. Hinaman emphasized that he never even looked at what the black population had been in the 2001 districts under the 2000 census.[58] The state told the district court the same thing, noting that the Department of Justice benchmark – which it was seeking to replicate – was the population under the 2010

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[54] J.S.App. 100, 103.

[55] Tr. v. 1, at 54.

[56] Tr. v. 3, 221.

[57] Tr. v. 3, 118, 142, 145.

[58] Doc. 134-4, APX 75, at 23-24.

census in the old 2001 districts.[59] The state's post-trial brief contained a table which compared the composition of the districts under the 2012 plan with the composition of those districts under the 2001 plan after the 2010 census.[60]

However, in assessing the significance of the 2012 plan, the majority below relied on the wrong table in the state's proposed findings. The table set out at p.47 of the Jurisdictional Statement Appendix lists the population in the 2001 districts at the time of the 2000 census, *not* after the 2010 census.[61] The failure to distinguish between the percentages in those districts under the 2010 census – which the drafters had used as their benchmark – and the different percentages under the 2000 census, led to a series of problems. First, the majority opinion, relying on that table, repeatedly states erroneously that the 2012 plan lowered the black population percentage in 13 House districts and raised it in only 14. J.S.App. 46, 159-60.[62] In fact (compared to the population under the 2010 census) the 2012 plan raised

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[59] Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 11, 37.

[60] *Id.* at 12-14.

[61] The figures for the 2001 districts are in the fourth column from the right.

[62] In another passage the majority compared the black *voting age* population in the 2012 and 2001 districts under the 2010 population. J.S.App. 182. It is undisputed, however, that the district-specific minimum racial ratios were based on total population, not voting age population.

the black population percentage in 20 House districts and lowered it in only 7.[63] Second, apparently also relying on this table, the majority rebukes the dissenting judge for "fail[ing] to mention that there are 5 majority-black House districts below 60 percent under the new plan in contrast with only 2 majority-black House districts below 60 percent under the 2001 plan...." J.S.App. 160. In fact, under the 2001 plan after the 2010 census there were 6 majority-black House districts (not 2) below 60%.[64] The 2012 plan increased the black population percentage in all of them, raising 2 to over 60%, and only created a new fifth "majority-black" district under 60% by also increasing the population in what had been a black plurality district under the 2001 plan.[65] Third, the majority criticized the dissenting judge for ignoring the record of "many ... examples" in which the 2012 plan had reduced the black percentage of majority-black districts. J.S.App. 154. But the court's calculations utilize the data in the table at J.S.App. 47, which is based on the wrong census. In fact, in 5 of the 8 examples which follow this statement the black

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[63] APX 6; J.A. 103-06.

[64] Under the 2010 census HD 32, 53, 54, 82, 83, and 84 were under 60% black. APX 6; J.A. 103-06.

[65] APX 6; J.A. 103-06. The 2012 plan raised to over 60% the black populations in HD 32 and HD 82. HD 85 was changed from a plurality-black district to a majority-black district.

population percentage (as measured after the 2010 census) actually was increased by the 2012 plan.[66]

(3) The Legislature's Guidelines expressly set out as one of the "criteria for ... legislative ... districts" "avoid[ing] when ever [sic] possible" putting two incumbents in the same district.[67] That policy, the Legislature explained was "embedded in the political values, traditions, customs, and usages of the State of Alabama."[68] Protecting the core of each existing district was also an avowed criterion for the redistricting plan, in part because it protected existing communities of interest, another criterion expressly mandated by the Legislature.[69] Both of these traditional districting principles were expressly sacrificed to the Legislature's higher goal of achieving the district-specific minimum racial ratios. As the dissenting judge below pointedly observed, "[i]n [two House districts] the racial quotas trumped the stated goals of both maintaining the core of districts and avoiding conflicts between incumbents." J.S.App. 233.

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[66] The 2012 plan increased the black population percentage in HD 52, 53, 54, 83 and 97 (compared to their populations in the 2001 districts under the 2010 census), all of which the majority described as having reduced black population percentages. J.S.App. 154. The dissenting judge correctly noted that the 2012 plan had increased the black population percentage in those districts. J.S.App. 208 n.16.

[67] Doc. 30-4, at 2-3 (capitalization omitted).

[68] *Id.* at 3.

[69] *Id.* at 3; J.S.App. 147.

The state expressly agreed, and the district court correctly found, that the majority-black HD 53 was cannibalized so that the black population from that district could be divided up among the surviving majority-black House districts in Jefferson County, in order to avoid any reduction in their black population percentage. J.S.App. 38. The dismemberment of HD 53 enabled the state to keep five of those House districts over 65% black, and three of them over 70% black.[70] The incumbent Representative in HD 53, Demetrius Newton, the former Speaker pro tempore and one of the longest serving black members of the Alabama Legislature, was placed in the district of another incumbent. Neither the core nor any other part of HD 53 survived; the district number was assigned to a new district 100 miles away in Madison County.

The state expressly agreed, and the district court correctly found, that HD 73 was also cannibalized for the same reason. (Although the majority below refers to HD 73 as "majority white," it actually had a black plurality when it was cannibalized in 2012; *see* J.S.App. 37 (majority opinion), 200 n.10 (dissenting opinion)). The black population which had once been part of that district was divided up among majority-black House districts in Montgomery County in order to avoid any reduction in their black population percentages. J.S.App. 36-37. The incumbent representative from HD 73 was placed in the district of another

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[70] SDX 403.

incumbent. Neither the core nor any other part of HD 73 survived; that district number was assigned to a new, overwhelmingly white district 75 miles away in Shelby County.

The black populations culled from these two districts were used to try to meet the district-specific minimum racial ratios in 8 Jefferson County majority-black districts and 3 Montgomery County majority-black districts; the cannibalization of HD 53 and HD 73 thus accounts for about 40% of the majority-black districts whose ratios were maintained.

The majority below commented that "Hinaman avoided all incumbency conflicts in the Senate and permitted only two conflicts in the House." J.S.App. 160; *see id.* at 57 ("only" two conflicts between incumbents). But the "only" highlights the significance of the undisputed facts; avoiding conflicts was a fundamental standard for the redistricting, which was never sacrificed except when doing so was necessary to satisfy the district-specific minimum racial ratios. Elsewhere the court explained that "Hinaman avoided, as much as possible, the placement of more than one incumbent in each district ... [a]nd ... to preserve communities of interest, Hinaman preserved, as much as possible, the core of each existing district." J.S.App. 147. But again, the qualification "as much as possible" acknowledges that protecting these traditional districting principles was not "possible" if they conflicted with the district-specific minimum racial ratios. The court dismissed the dismemberment of these two districts on the ground that "neither

of those House conflicts remains because afterward Representative Newton [from HD 53] died and Representative Hubbard [from HD 73] moved his residence." J.S.App. 160. But the drafters' insistence on putting these incumbents in the districts of other representatives is important, not because of the injury to the political careers of Newton and Hubbard, but because it is a glaring example of the subordination of traditional districting principles to the maintenance of the district-specific minimum racial ratios.

(4) Avoiding the division of counties is a districting principle of constitutional significance in Alabama. That principle is embedded in the state Constitution; section 200, for example, provides that "No county shall be divided between two [Senate] districts...." Legislative districting plans have been invalidated for violating these whole-county requirements. *Burton v. Hobbie*, 591 F.Supp. 1029, 1035 (M.D. Ala. 1983) ("we find that Act No. 82-629 is impermissible under Ala.Const. art. IX §§ 198, 199 & 200 because of its disregard for the integrity of county lines. Boundaries of thirty counties were unnecessarily split by the plan."). The Guidelines adopted by the Legislature for the 2012 redistricting provided that "[e]ach House and Senate district should be composed of as few counties as practicable."[71] Those Guidelines also provided that county boundaries by definition delineated a "community of interest" which should be

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[71] Doc. 30-4, at 3.

respected.[72] During the public hearings that preceded the adoption of the 2012 plan, the most widely expressed concern of local officials and voters was to maintain county lines and to minimize the number of districts that crossed county lines.[73]

Minimizing the number of districts that cross county lines is uniquely important in Alabama because of its unusual impact on control of individual counties. Alabama does not have the county home rule that prevails in at least most of the country. The Alabama Constitution contains no general grant of authority to county officials; rather, the state Constitution empowers the counties themselves to act only in a number of limited ways. Many of the issues affecting only a specific county are outside the authority of county officials, and must instead be dealt with by the state Legislature.[74] Each year the legislature adopts a large number of measures which affect only a single county, making many of the decisions that almost anywhere else would be handled at the local level.

For decades the Alabama Legislature has fashioned these county-specific measures through an informal local delegation system. As a general matter, the Legislature will approve any county-specific proposal sponsored by the legislative delegation from

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[72] *Id.* at 3-4.

[73] J.S.App. 30-31, 44; NPX 323, par. 117.

[74] J.S.App. 341-42, 428-29.

that particular county. Depending on the size of a county's delegation, agreement on such measures may by tradition require approval of a majority of the delegation, or in some instances unanimity. J.S.App. 342-46 (dissenting opinion). For all practical purposes, the legislative delegation for a particular county wields most of the powers that in at least most states would be held by a county council or commission.

Under the local delegation custom, the delegation which controls legislation for a particular county is composed of every member of the House or Senate whose district includes even a small portion of that county. Thus the county delegation can and often does include state legislators most of whose districts lie outside the county in question; those legislators may wield the decisive votes when there is a disagreement among the legislators whose districts lie wholly within the county in question, or when unanimity is required. Whenever a district crosses county lines, it places the legislator involved on the legislative delegations for multiple counties. County residents understandably may object to additional line-crossing districts, because those districts can reduce the amount of control which county voters have over the legislative delegation that largely determines what county-specific measures will be enacted by the

Legislature.[75] *See* J.S.App. 367-75 (dissenting opinion).

The framers of the 2012 plan repeatedly acknowledged that achieving the district-specific minimum racial ratios required them to fashion districts that crossed county lines. Senator Dial explained that "we adopted the guidelines to keep counties intact as much as possible, but when you apply the Voting Rights Act on top of all that, it makes it almost impossible to keep all counties [intact]."[76] Thus when "[Senator] Singleton[ ] ... had to have more minorities ... he grew into Lamar [County]."[77] Hinaman agreed that "there would be county splits potentially based on the Voting Rights Act and not retrogressing a Majority/Minority district."[78] For example, "House District 69 was ... an African-American Majority district ... [and] was short population and I needed to bring it into Montgomery County."[79] Satisfying the district-specific minimum

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[75] Smitherman testimony, tr. v. 2, at 13 ("we're at the mercy of the suburbs and the surrounding other counties"). At one public hearing, Representative McClendon, speaking as a representative of his home county, not as a co-chair of the Reapportionment Committee, said that placing in his county delegation many legislators who reside in other counties "affects accountability [and] is not right." J.S.App. 374-75 (quoting Doc. 30-26, at 7).

[76] Tr., v. 1, at 91.

[77] *Id.* at 48.

[78] Hinaman dep., APX 75, Doc. 134-4, at 34.

[79] *Id.* at 94.

racial ratio repeatedly led to crossing county lines when the required additional black population was in another county. Even within a county, the awkward manner in which that ratio was satisfied could force another district to straddle a county boundary. The elimination of HD 53 in Jefferson County triggered a series of changes which resulted in two additional districts (both majority white) located partly in that county and partly in suburban counties.[80] There was repeated testimony that complying with the ratio in one county had led to dividing counties among other districts several counties away.[81] The 1% deviation rule rendered the entire districting scheme more rigid, so that the gerrymandering of one district would affect any number of others "like dominos."[82]

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[80] *Compare* SDX 412 (2001) (HD 34, 43, 45, 48) *with* SDX 404 (2012) (HD 14, 15, 16, 43, 45, 48). Under the 2001 House plan there were 13 Jefferson county districts that were located wholly within the county. If that number had remained the same under the 2012 plan, there would have been 66,460 leftover individuals who had to be divided among districts that extended outside of the county. The elimination of HD 53 meant that there were 111,981 such persons.

[81] Tr. v. 1 at 48-49, 114; Dial affidavit, APX 66, at ¶¶ 84, 87; Dial dep., APX 66, Doc. 125-3 at 51-52; Hinaman dep., APX 75 at 53-55.

[82] Hinaman testimony, tr. v. 3, at 69, 123-24; *see* J.S.App. 62, 97-98 ("domino effect"); tr. v. 1, at 108 ("it's all like dominos, and . . . one thing affects the other."); Hinaman dep., APX 75, Doc. 134-4 at 53-54.

The district court majority simply did not discuss the undisputed testimony that satisfying the district-specific minimum racial ratio had indeed led to splitting counties among multiple districts. That subordination to racial considerations of the state constitutional principal of respecting county lines is precisely what is important under *Shaw*.

(5) The Legislature's Guidelines provided that precinct boundaries should be respected because precincts constituted "a community of interest" that should be respected, reflecting a policy embedded in Alabama tradition.[83] The district court found that "[w]hen necessary to avoid retrogression, Hinaman split precincts at the census block level." J.S.App. 104. Hinaman was quite explicit about his practice of dividing precincts along racial lines in order to comply with the district-specific minimum racial ratio.

> Q. And if [a] precinct did not increase the black percentage, or at least it didn't increase it as much as you wanted, you would simply split the precincts and go down to the block level and look for a majority black block or several blocks.
>
> A. Well, that's a little bit of a simplification. I mean, I tried to look at the addi[ ]tions en masse, not just a precinct. I might add a ... majority white precinct and a majority African American precinct; but if you look at the

[83] Doc. 30-4, at 3-4.

> end number, it did not retrogress the overall end number for that precinct, then they were added in. If for some reason they retrogressed that number, then, yes. So I would split precincts.
>
> Q. And when you split precincts, you would have to go to the block level?
>
> A. Yes, sir.
>
> Q. And could you see – you could see on th[illegible] screen, couldn't you, which blocks on your screen had black populations of substantial numbers, right?
>
> A. Certainly.[84]

The record contains substantial evidence documenting specific instances in which particular precincts were divided on the basis of race, with the black portions going to a majority-black district while the white areas were made part of an adjacent majority-white district.[85] The only information that Hinaman had below the precinct level was the racial composition of individual census blocks. J.S.App. 203-05.

The majority below reasoned that "even where it occurred, precinct splitting was less of an evil to be avoided in redistricting than the subordination of other redistricting criteria, such as compliance with

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[84] Tr. v. 3, at 143; *see* APX 75, Hinaman dep., at 117-18.

[85] Hinaman, tr. v. 3 at 142-44, 178-79, 185-86; Hinaman dep., at 111-14, 117-18.

... the Voting Rights Act." J.S.App. 159. That statement acknowledges that precincts *were* being divided along racial lines to satisfy what the drafters mistakenly insisted was a requirement of the Voting Rights Act.

The majority also suggested that the acknowledged race-based precinct splitting was not legally significant because other precincts, perhaps more of them, might have been split to satisfy the 1% deviation rule.[86] "Our dissenting colleague does not cite ... evidence for support of his assertion that majority-black districts suffered the brunt of the precinct splits...." *Id.* "Taken as a whole, Hinaman's testimony confirms that race was not the predominant motivating factor in precinct splitting." J.S.App. 159. Whether *most* precinct splitting occurred for non-racial reasons might be relevant in a case where a plaintiff claimed that a pervasive pattern of precinct splitting along racial lines constituted circumstantial evidence that a district had been constructed with a racial purpose. Here, however, the drafters' racial purpose was undisputed; the evidence of race-based precinct splitting was significant only as confirmation that the drafters had indeed subordinated the integrity of precincts to achieving the district-specific minimum racial ratio, as their avowed purpose indicated they would. The issue here is whether achieving that racial ratio was the predominant motive in

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[86] *But see* J.S.App. 156 (House plan split 57% of majority-black precincts but only 39% of majority-white precincts).

constructing the majority-black districts, not whether – as the court below seemed to believe – race rather than the 1% deviation rule was most frequently the reason that precincts were divided.

(6) The 2012 plan managed to add to SD 26 a total of 14,806 blacks but only 36 whites. The racial machinations needed to achieve that were particularly complex.

Under the 2001 plan after the 2010 census, SD 26 was underpopulated by 11.64%, 15,898 people.[87] The population of SD 26 was 72.75% black. J.S.App. 48. SD 26 occupied most of Montgomery County, including the entire southern half of the county.[88] Immediately to the south of SD 26 was Crenshaw County, with a population of 13,906.[89] Because of unrelated changes in the districting scheme, Crenshaw County was no longer part of any Senate district.[90] So the obvious solution to both problems was to add Crenshaw County to the adjoining SD 26, a step that would have largely solved the underpopulation problem in SD 26. But Crenshaw was only 23.39% black; adding it to SD 26 would have reduced SD 26 from 72.75% to 67.15% black.[91] Hinaman explained that he was unwilling to add

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[87] SDX 402.

[88] J.A. 192; APX 37.

[89] NPX 328, at 1.

[90] *See* tr. v. 3, at 123, 125.

[91] The resulting district would have had a population of 134,572, of whom 91,039 would have been black.

Crenshaw County to SD 26, because doing so would reduce the black percentage of the population in that district. At trial Hinaman acknowledged that if *all* the population added to SD 26 had been white, it still would have been overwhelmingly black; but that simply was not good enough.[92]

So the drafters rejected adding Crenshaw County to SD 26, and looked for another solution. They decided to add Crenshaw County to SD 25, a 71% white district. But SD 25 was located in the northern part of Montgomery County, and parts of another county even further to the north. SD 25 did not adjoin Crenshaw County, and the portion of SD 25 nearest to Crenshaw County was over 20 miles away, with SD 26 in between. So to connect Crenshaw County to SD 25, the framers created what Hinaman described as a "land bridge" – through part of the old SD 26 – between SD 25 and Crenshaw County. *See* J.S.App. 172. By adding 13,906 mostly white people from Crenshaw County to SD 25, it was then possible to transfer an equal number of people from predominantly black portions of SD 25 in Montgomery County to SD 26. Indeed, the drafters *had to* cancel out the addition of the Crenshaw County population to SD 25, because SD 25 was already slightly overpopulated.[93]

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[92] Tr. v. 3, at 179.

[93] Under the 2012 plan 13,906 persons were added to SD 25 from Crenshaw County, and a net total of 15,785 persons were added to SD 26 from SD 25. That meant that SD 25 lost a net of 1,879 persons from the population it had prior to the addition of

(Continued on following page)

Attaching Crenshaw County to SD 25 could not result in a net increase in the SD 25 population without violating one person, one vote; demographically, the land bridge had to be a land bridge to nowhere.

But doing that alone could not have repopulated SD 26 with a virtually all-black group. There assuredly was not a portion of SD 25 that contained 14,806 blacks but only 36 whites. The only way to achieve that exceptional result was to swap predominantly white areas in SD 26 for predominantly black areas of SD 25; the *net* effect of such an exchange could be to add only blacks to SD 26. In terms of traditional districting principles that made no sense; one does not repopulate an underpopulated district by removing people. But that is precisely what Hinaman did. He transferred from *under*populated SD 26 to *over*populated SD 25 the southwest quarter of Montgomery County, an area in the northwest corner of the county, and a portion of the center of the county.[34] The incumbent Senator in SD 26 explained that the new boundary between SD 25 and SD 26 was drawn

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Crenshaw and transfer of population to SD 26. After all of this, SD 25 had a population of 135,492; so before these changes, the SD 25 population (partly in Montgomery County and partly in Elmore County) was 137,361. The ideal Senate district size under the 2010 census was 136,563.

[34] *Compare* APX 37 *with* APX 39; *compare* J.A. 191 *with* J.A. 192.

along racial lines;[95] Hinaman offered no non-racial explanation for removing these areas from underpopulated SD 26. By then replacing predominantly white portions of SD 26 with predominantly black areas from SD 25, the black population in SD 26 was increased from 72.75% to 75.22%, to a level higher than any other Senate district. The resulting SD 26 is a strangely shaped configuration that resembles a downward-facing sand fiddler crab.[96]

The district court acknowledged "race was a factor in the drawing of District 26," noting that Hinaman was seeking "to maintain roughly the same black percentage of the total population [in SD 26]" (J.S.App. 152), and that the Legislature "preserved ... the percentage of the population that was black." J.S.App. 172. The court describes Hinaman as having transferred a portion of Montgomery County "from District 26 to create a land bridge between the former

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[95] J.S.App. 202:

> [Senator] Ross stated that, despite the underpopulation of his district, the new plan actually split precincts that were already part of SD 26, moving white portions of those precincts out of his district while retaining only the black portions; in other words, despite needing a huge number of new residents [in SD 26], Hinaman *removed* white residents already living in SD 26. . . . By taking these various steps to remove white residents and add black ones, the drafters achieved and even exceeded their quota of 72.75% black for the district.

(Emphasis in original).

[96] APX 39; J.A. 197.

area of District 25 and Crenshaw County" (J.S.App. 172), without mentioning Hinaman's acknowledgment that he had connected Crenshaw County to SD 25 rather than to SD 26 in order to avoid reducing the black population percentage in SD 26. The court argued that the dismemberment of SD 26 at least "preserved the core of the existing District" (J.S.App. 172); but it never attempted to explain why (other than for the land bridge) the framers would have removed any areas at all from the underpopulated SD 26. The court explained that Hinaman had added to SD 26 "populous precincts in the City of Montgomery which shared many characteristics with other areas of District 26." J.S.App. 172. But Hinaman never referred to any "characteristics" shared by SD 26 and the portions of SD 25 that were added to it; Hinaman was just "going by the numbers," and the only number that mattered to him about the areas added to SD 26 was the number of black people who lived there. The court notes that the areas transferred from SD 25 to SD 26 "included both black and white persons" (J.S.App. 172); but Hinaman was perfectly clear that he selected those areas precisely because – unlike Crenshaw County – they included far more blacks than whites.

(7) There are no material factual disputes about the manner in which the state achieved the district-specific minimum racial ratios in this case. When achieving those ratios conflicted with the Legislature-endorsed tradition that incumbents should not be placed in the same district, that tradition was

disregarded. When implementing the ratios was inconsistent with the principle that existing districts should be preserved, the districts were cannibalized. When the ratios could not be created without disregarding the whole-county provisions of the state Constitution and the legislative Guideline against splitting counties and precincts, the counties and precincts were divided. When the ratios required that people actually be taken *out* of underpopulated districts, they were removed. The district court's assertion that none of this pattern of activity should be characterized as "subordinating" traditional districting principles to the drafters' professed racial purpose reflects, not any factual disagreement, but merely an insistence by that court in using the term "subordination" in a highly idiosyncratic manner inconsistent with the legal standard in *Shaw* and its progeny.

II. THE RACE-BASED DISTRICTING WAS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST

Because race was the predominant motivating factor in the redrawing of the majority-black districts, the state must establish that the redistricting plan satisfied strict scrutiny. To do so, Alabama must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. The state contends that the manner in which those districts were fashioned was required by section 5 of the Voting Rights Act. We agree that Alabama may seek to justify its 2012 plan as necessary to comply with

section 5, despite this Court's intervening decision in *Shelby County, Ala. v. Holder,* 133 S.Ct. 2612 (2013). But section 5 neither required nor sanctioned the unusual race-based scheme used to create that plan.

"A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I,* 509 U.S. at 655. A mistaken belief as to the meaning of section 5 does not constitute a compelling interest. *Miller v. Johnson*, 515 U.S. at 922-23. Alabama's actions must have been "required by a correct reading of § 5." *Shaw II,* 517 U.S. at 911. The district court concluded that section 5 establishes a per se rule, requiring a covered jurisdiction whenever possible to maintain the level of the minority population percentage in every majority-minority district, regardless of how high that percentage might be and without consideration of any other relevant circumstances. J.S.App. 180-81. That interpretation "was woefully incorrect." J.S.App. 247 (dissenting opinion).

Section 5(b) provides that a covered jurisdiction may not enforce a voting standard that "will have the effect of diminishing the ability of any citizens of the United States on account of race ... to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). That language cannot fairly be read to require a covered jurisdiction to permanently maintain the minority population percentage in every district. Some population percentages would be so high that a reduction would not realistically diminish the ability of

the protected group to elect the candidates of its choice. If a districting plan reduced some group from 100% of a district to 90%, it would be very odd to say that the legislation had diminished the ability of that group to elect candidates of its choice. At some population level – the figure would of course vary with any number of circumstances – the ability of a protected group to elect the candidates of its choice would be so obvious that changes (up or down) above that level would be of no practical importance.

The statutory language requires an evaluation of the effect of a redistricting plan on the ability of citizens to elect not just one candidate, but the candidates – plural – of their choice. The redistricting steps taken to maintain the minority population percentage in one district might require reduction of the percentage of that population in another district; section 5 obviously cannot mean that the minority population must be unchanged in *both* districts.[97]

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[97] Senator Dial insisted that section 5, as he interpreted it, had forced the state to eliminate most of the districts that were 30-50% black, in order to maintain the racial ratios in the majority-black districts. Tr. v. 1, at 61.

> Q. So what you're saying Senator, is that in pursuing your overriding goal of maintaining the large black majorities in the majority black districts, if that resulted in blacks being taken out of the majority white districts, diluting their influence in those majority white districts, that was just collateral damage? That was just an accident or the result you get because of pursuing the Voting Rights Act?
>
> A. That was because of the Voting Rights Act.

(Continued on following page)

Cannibalizing districts reduces the number of candidates of choice which a group can elect; the plan in this case preserved the black population percentage in eight Jefferson County districts by eliminating entirely the ability of blacks in that county to elect a ninth Representative of their choice. In that sense the plan diminished, rather than protected, the ability of blacks to elect the candidates of their choice.

Interpreting section 5 to bar in *all* circumstances any reduction in the black population percentage of a district would have peculiar consequences.

> On the majority's view, if a district is 99% black, the legislature is prohibited by federal law from reducing the black population to a mere 98%. Read in this way, § 5 would become a one-way ratchet: the black population of a district could go up, either through demographic shifts or redistricting plans (like this one) that raise the percentage of black people in some majority-black districts. But the legislature could never lower the black percentage, at least so long as it was "feasible" to avoid it.

J.S.App. 263 (dissenting opinion).

Section 5(b) was adopted in part to overturn this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461

Q. So we can blame the Voting Rights Act for the loss of black influence in the majority white districts?

A. Absolutely.

(2003), that section 5 permits a jurisdiction to replace a district in which minority voters can elect the candidates of their choice with districts in which they would have instead the ability to "influence" the political process. 539 U.S. at 482. Congress sought to codify the different interpretation of section 5 in Justice Souter's dissenting opinion. Justice Souter noted that every member of the Court agreed that section 5 did not invariably require a covered jurisdiction to freeze the level of the minority population in a district. "The District Court began with the acknowledgment (to which we would all assent) that the simple fact of a decrease in black voting age population ... in some districts is not alone dispositive about whether a proposed plan is retrogressive." *Georgia v. Ashcroft,* 539 U.S. at 498 (Souter, J., dissenting); *see id.* at 504-05 (Souter, J., dissenting) ("nonretrogression does not necessarily require maintenance of existing supermajority minority districts"). Senator Leahy, the original and lead sponsor of the legislation, expressly endorsed that interpretation of section 5, noting that it was consistent with earlier precedent.[98] Although, as the district court noted, the

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[98] 152 Cong. Rec. S 7949-05 (2006) ("The amendment to Section 5 does not . . . freeze into place the current minority voter percentages in any given district. As stated by the dissenters in *Georgia v. Ashcroft,* as well as by Professor Arrington and Professor Persily at the Committee hearings, reducing the number of minorities in a district is perfectly consistent with the pre-*Ashcroft* understanding of Section 5 as long as other factors demonstrate that minorities retain their ability to elect their preferred candidates.").

2006 legislation that added section 5(b) was intended in certain respects to establish a more stringent section 5 standard, that difference is not relevant here. Congress intended only to restore, not to alter, the pre-*Georgia v. Ashcroft* rule that forbad retrogression in the ability of a protected minority to elect candidates of its choice.

The Department of Justice, which administers section 5, has consistently[99] maintained – and advised covered jurisdictions – that whether a districting plan is retrogressive does not turn solely on the population of the district. "In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment.... [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act,* 76 Fed.Reg. 7470, 7471 (Feb. 9, 2011). The Department considers among other things "whether minorities are overconcentrated in one or more districts," a factor which necessarily recognizes that a minority population percentage above some level would have the effect of reducing overall minority voting strength. *Id.* at 7472; *see* 52 Fed.Reg. 486 (Jan. 6, 1987); 28 C.F.R. § 51.59(d).

---

[99] The Department interpreted section 5 in the same manner in 2001. 66 Fed.Reg. 5412, 5413 (Jan. 18, 2001).

The Department has specifically pointed to actual election results as important to understanding whether a redistricting plan would reduce the ability of members of a protected group to elect the candidates of their choice. "[T]his determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." 76 Fed.Reg. at 7471. In determining the population level at which minorities have the ability to elect candidates of their choice, a page of election history may be worth a volume of predictions. "[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Johnson v. De Grandy,* 512 U.S. 997, 1020 (2000). Of course the assessment of election data, as any other information, may require complex judgments; the election of a single candidate supported by the minority commu[illegible] may prove little.

The court below suggested that "the best evidence available" as to what should be done to comply with section 5 was to be found in the actions of the Democratic controlled 2001 Legislature, which the district court insisted had deliberately "maintained"[100] the black population percentages in each of the majority-black districts, "by adding similar percentages of black voters to those districts." J.S.App. 184. As we explained above, however, the Legislature in

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[100] J.S.App. 4, 6-7, 20, 22, 147, 151, 161-62.

2001 actually did the opposite, reducing the black population percentages in almost all those House and Senate districts. (*See* p. 3, *supra*; Brief Appendix, pp. 8a-10a). Even if that were not the case, the redistricting plan of a particular state throws no light on the meaning of the statute.

This emphatically is not a case in which a state made a deliberate and informed assessment of the population level at which minority voters in a particular district would be able to elect the candidates of their choice. Hinaman consistently stressed that he never considered anything – past election results, voter participation rates, or other studies – except the black population percentage under the 2001 lines after the 2010 census.[101]

What this Court said in *Bartlett v. Strickland*, 556 U.S. 1 (2008), about section 2 of the Voting Rights Act is equally applicable to section 5. "It would be an irony ... if [the provision] were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'" 556 U.S. at 25 (quoting *De Grandy*, 512 U.S. at 1020) (plurality opinion). As Judge Thompson eloquently emphasized in his dissenting opinion, "[t]he purpose of the [Voting Rights Act] is to help minority groups achieve equality, not to lock them into legislative ghettos." J.S.App. 262.

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[101] Tr. v. 3, at 148-9; Hinaman dep., APX 75, Doc. 134-4, at 139, 147.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C., provides:

> (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting,

or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days

after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or

abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

2001 and 2012 Plans Under 2010 Census Majority-Black House Districts			
District	**2001 Plan**	**2010 Plan**	**Difference**
19	69.82%	61.25%	-8.57%
32	59.34%	60.05%	+.71%
52	60.11%	60.13%	+.02%
53	55.71%	55.83%	+.12%
54	56.73%	56.83%	+.10%
55	73.55%	73.55%	0
56	62.13%	62.14%	+.01%
57	68.42%	68.47%	+.05%
58	77.86%	72.76%	-5.10%
59	67.03%	76.72%	+9.69%
60	67.41%	67.88%	+.47%
67	69.14%	69.15%	+.01%
68	62.55%	64.56%	+2.01%
69	64.16%	64.21%	+.05%
70	61.83%	62.03%	+.20%
71	64.28%	66.9%	+2.6%
72	60.12%	64.5%	+4.4%
76	69.54%	73.79%	+4.25%
77	73.52%	67.04%	-6.48%
78	74.26%	69.99%	-4.27%
82	57.13%	62.14%	+5.01%
83	56.92%	57.52%	+.60%
84	50.61%	52.34%	+1.73%

97	60.66%	60.66%	0
98	65.22%	60.02%	-5.20%
99	73.35%	65.61%	-7.74%
103	69.84%	65.06%	-4.78%

Source: Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 13-14; SDX 403 at p.5 col. 7; APX 6

2001 and 2012 Plan Under 2010 Census Majority-Black Senate Districts			
District	**2001 Plan**	**2012 Plan**	**Difference**
18	59.92%	59.10%	.82%
19	71.59%	65.31%	-6.28%
20	77.82%	63.15%	-14.67%
23	64.76%	64.84%	+.08%
24	62.78%	63.22%	+.44%
26	72.69%	75.13%	+2.44%
28	50.98%	59.83%	+8.85%
33	64.85%	71.64%	+6.79%

Source: Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 12.

1993 and 2001 Plans Under 2000 Census Majority-Black House Districts			
District	**1993 Plan**	**2001 Plan**	**Difference**
19	78.565%	66.039%	-12.526%
32	63.490%	59.598%	-3.892%
52	73.870%	65.848%	-8.022%
53	65.298%	64.445%	-.853%
54	63.061%	63.276%	+.215%
55	76.270%	67.772%	-8.498%
56	70.268%	62.665%	-7.603%
57	82.615%	62.967%	-19.648%
58	74.163%	63.518%	-10.645%
59	66.255%	63.241%	-3.014%
60	74.876%	64.348%	-10.528%
67	71.032%	63.447%	-7.585%
68	62.938%	62.211%	-.727%
69	64.855%	65.308%	+.453%
70	75.603%	62.827%	-12.776%
71	67.736%	64.191%	-3.545%
72	64.652%	60.748%	3.904%
76	76.527%	73.309%	-3.218%
77	74.802%	69.677%	-5.125%
78	68.874%	72.697%	+3.823%
82	78.826%	62.663%	-16.163%

83	60.782%	61.214%	+.432%
85	53.312%	47.863%	-5.449%
97	67.243%	64.738%	-2.505%
98	69.401%	64.448%	-4.953%
99	74.916%	65.250%	-9.666%
103	75.299%	63.049%	-12.250%

Source: J.S.App. 47, col. 4 and SDX 419

1993 and 2001 Plans Under 2000 Census Majority-Black Senate Districts			
District	**1993 Plan**	**2001 Plan**	**Difference**
18	67.588%	66.685%	.903%
19	76.452%	66.227%	-10.225%
20	71.829%	65.697%	-6.132%
23	66.081%	62.305%	-3.776%
24	68.964%	62.409%	-6.555%
26	73.485%	71.507%	-1.978%
28	59.269%	56.458%	-2.811%
33	70.483%	62.451%	-8.032%

Source: J.S.App. 48 col. 4 and SDX 416

APPELLEE'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT - 9 2014
OFFICE OF THE CLERK

Nos. 13-895, 13-1138

In the
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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October 9, 2014

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QUESTIONS PRESENTED

Appeal No. 13-1138 and Appeal No. 13-895 have been consolidated for a single argument. This brief addresses the following questions:

1. Whether the plaintiffs proved that Alabama's legislative redistricting plans for the House and Senate unconstitutionally classify black voters by race on a statewide basis, even though they did not show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

2. Whether the plaintiffs in Appeal No. 13-1138 have standing to challenge the House and Senate plans.

PARTIES

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ADC	Alabama Democratic Conference; also the plaintiffs associated with the Alabama Democratic Conference
ALBC	Alabama Legislative Black Caucus; also the plaintiffs associated with the Alabama Legislative Black Caucus
ALBC Br. App.	The appendix to the ALBC's Brief in appeal No. 13-895
App.	The appendix to this brief
APX	An exhibit introduced at trial by the ALBC
C	A "common" exhibit introduced at trial by all parties
DOJ	Department of Justice
DX	An exhibit introduced at trial by the defendants
HD	House district
J.A.	Joint Appendix
J.S. App.	The appendix to ALBC's jurisdictional statement in Appeal No. 13-895
Rep.	Representative
SD	Senate district
Tr.	Trial transcript; citations are to volume.page number (ex.: Tr. 1.123)

INTRODUCTION

For much of the previous century, Alabama was notorious for its refusal to comply with federal election law. This is why Congress passed the Voting Rights Act of 1965. This is why the Court ruled in *Reynolds v. Sims*, 377 U.S. 533 (1964), that states must have legislative districts of equal population. This is why Alabamians march across the Edmund Pettus Bridge every spring. This history is powerful. Its toll is heavy.

The weight of this history motivated Alabama's new Republican leaders in 2010 to comply strictly with federal law, cooperate with black legislators, and draw fair redistricting plans for the state House and Senate. The plans they adopted kept the percentage of majority-black districts on a statewide basis proportional to the black voting population. The plans created an additional, compact majority-black House district in an area where the black population was growing. And, as explained below, the plans are not consistently different from the plans that the plaintiffs in this litigation proposed during the legislative process. The plans did not, however, preserve specific features of a 2001 partisan gerrymander designed to elect white Democrats. And that is what this litigation is about.

For their part, the plaintiffs are not asking the Court to undo a racial gerrymander, but to order one. The plaintiffs suppose that gerrymandering is the best explanation for why the majority-black districts in Alabama have "supermajority percentages" of black persons. But that would come as a surprise to

the many black Alabamians who live in counties and cities that are mostly populated by members of their own race.

Consider, for example, the plaintiffs' suggestion that the black population of HD 67 in Dallas County is best explained by the application of a "quota" or "policy." The population of Dallas County is 70% black. App. 7a. The county to the southeast, Lowndes County, is 74% black. The county to the northwest, Perry County, is 69% black. The county to the southwest, Wilcox County, is 73% black. *Id.* It would take a naked racial gerrymander to make the population of HD 67 anything but what it is. The same is true in Birmingham, Montgomery, and many of Alabama's small towns and rural areas.

We agree with the United States that the plaintiffs' blunderbuss attack on these House and Senate plans cannot succeed. The plaintiffs' statewide claims are inconsistent with this Court's caselaw and contrary to common sense. When a state's legislative leaders say they prioritized compliance with federal law in a statewide redistricting plan, they are recognizing the Supremacy Clause, not confessing to a racial gerrymander.

We part ways with the United States on the notion of a remand, however. With the exception of four Senate districts that the district court separately and thoroughly addressed, the plaintiffs have always disclaimed any district-specific challenges. The three judges on the district court should not have their four-day trial and final judgment undone to let the plaintiffs make new arguments about districts they have never challenged. The Court should affirm the district court.

STATEMENT

I. Alabama's 2010 redistricting process

After the 2010 census, the Alabama Legislature's Reapportionment Committee held an unprecedented 21 public hearings at locations throughout Alabama, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. J.S. App. 30-36. The Committee developed proposals for Alabama's 105 House districts and 35 Senate districts, which were enacted in substantial form on party-line votes. They were submitted for preclearance under Section 5 of the Voting Rights Act and approved by DOJ.

A. The Legislature adopted a 2% deviation, which limited opportunities for manipulation and gamesmanship.

After listening to several days of live witness testimony about the way these plans were drafted, the district court found as a matter of fact that, "[a]bove all," the drafters' foremost subjective goal was to "create more equality among districts throughout the State." J.S. App. 144. *See also* J.S. App. 94-105 (recounting testimony and expressly crediting testimony). Because of its focus on greater population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See* J.S. App. 27. A 2% variation allows for plus or minus 1% deviation from the "ideal" district. In real terms, this meant the population of each Senate district could vary only within a range of 2,730 people (2% of

136,564). Tr. 2.86. House districts could vary within a range of 910 people (2% of 45,521). By contrast, a deviation of 10% would permit a variance of 13,564 people in the Senate and 4,552 people in the House. *Id.*

The drafters' decision to adopt a 2% deviation had several important effects.

First, it ended key features of a previous partisan gerrymander. The Democrat-controlled Legislature in 2001 engaged in a "successful partisan gerrymander" by using a 10% deviation to "systematically under-populate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." J.S. App. 18, 145. *See* J.S. App. 17-24 (recounting history of the 2001 gerrymander). This strategy allowed the Democrats to spread black voters into neighboring majority-white districts so they could vote in support of white Democratic candidates. The partisan gerrymander meant that, with just 51% of the statewide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. J.S. App 24.

Because of the previous partisan gerrymander and organic population changes, all the majority-black districts were grossly under-populated after the 2010 census, and most of the majority-white districts were over-populated. Nine of the majority-black House districts were under-populated by more than 20% compared to the ideal district. J.S. App. 18. Similarly, seven of the eight majority-black Senate districts were under-populated by more than 10%, and two of those by more than 20%. J.S. App. 19. Performing the Democrats' 2001 partisan gerrymander in reverse, the drafters repopulated these majori-

ty-black districts by removing contiguous population from majority-white districts.

Second, the 2% deviation "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." J.S. App. 144-45. The 2% deviation thus represents the best practices of other States. *See* J.S. App. 29-30. *See also* J.S. App. 106-07 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. J.S. App. 29-30.

Third, the 2% deviation required the drafters to split precincts and counties. As we discuss *infra* 52-54, one of the plaintiffs' experts explained at length that the 2% deviation caused the number of county and precinct splits in the drafters' plans.

B. The Legislature complied with the Voting Rights Act.

The district court also expressly credited the testimony of the plan's drafters that, after population equality, their next highest subjective goal on the statewide level was to comply with the Voting Rights Act. *See* J.S. App. 94-105 (recounting and crediting testimony). The Alabama Legislature had to comply with Sections 5 and 2 of the Voting Rights Act to ensure that the plans were precleared by DOJ and withstood any vote-dilution litigation.

1. The credible evidence is that a safe majority-black district in Alabama should be more than 60% black.

It is undisputed that black political leaders told the drafters and district court that only districts with sizable black majorities, not bare majorities, would allow black voters to elect their candidates of choice as required by the Voting Rights Act. *See* J.S. App. 31, 96, 99. This includes the "dean of Alabama redistricting," Dr. Joe Reed, who has led the ADC since the 1970s and drawn numerous state and local districting plans in Alabama. J.S. App. 162, 165. He testified that districts must be at least 60% black, and sometimes more than 65% black, to allow black voters to elect the candidate of their choice. J.S. App. 76-77. *See also* J.S. App. 165 (expressly crediting Reed's testimony). These figures are supported by caselaw. *E.g.*, *Texas v. United States*, 831 F. Supp. 2d 244, 263 (D.D.C. 2011).

Dr. Reed and other black political leaders told the drafters that the percentage of black persons in a district does not accurately indicate the percentage of black persons who vote. J.A. 50-51, 177. Indeed, because the black population is younger than average, it is undisputed that the percentage of *voting-age* black persons in a district is generally two to three percentage points lower than the percentage of black persons overall. *See* J.S. App. 49-50, 76. This means that black persons are likely a minority of voters in a district that is 51% black.

Although black political leaders also warned the drafters against "packing," they indicated that packing would only be a concern when black population

percentages reached materially higher levels than 60% to 70%. Rep. Jackson, for example, warned the drafters at a committee meeting that he was "very concerned about" packing minority voters into a district that is "ninety-nine percent minority." J.A. 178. Instead, to prevent packing, he suggested that a minority district should be "sixty-two percent or sixty-five percent" black. J.A. 178. Senator Sanders similarly explained that "the majority African-American districts . . . ought not be less than 62 percent" and, separately, "I would hope that there's not packing." *See also* J.A. 177. Black political leaders were also concerned with manipulating black populations to help "conservative white Democrats." J.A. 174.

2. The drafters believed that black population percentages significantly below those in the prior plan would violate Section 5.

The drafters of the reapportionment plan believed that Section 5 of the Voting Rights Act prohibited them from "lowering the overall total number of majority African American districts in either plan" or making the minority population of a district "significantly below" what it was "looking at 2010 census [data] as applied to 2001 lines." J.A. 88. They were especially concerned about "large deviations from previous percentages" that they would have to explain to DOJ. APX 75 at 24-25 (Hinaman Depo.). As a strategy to comply with Section 5, the drafters decided to avoid reducing the black population of preexisting majority-black districts where possible.

This strategy did not impact the shape of some majority-black districts at all. Randy Hinaman, the political consultant who drew the new district lines, explained that he would add *any* contiguous precincts to the under-populated majority-black districts. J.A. 88 (explaining that he "may add a majority white precinct" or "a majority African American precinct"). Only after adding population to the under-populated majority-black districts "en masse" would he look at the "end number" for that district. J.A. 87-88. "And so in some districts I could add in anything I wanted, and it didn't matter because" the district did not need much additional population or "the changes I added didn't matter" for the black percentage. J.A. 87.

Although the ALBC says that the political consultant "selected particular areas, precincts or census blocks" on the basis of race, ALBC Br. 13, there is no citation for that sentence because that is not what the consultant did. Instead, the political consultant was adamant that he looked at race only *after* repopulating the majority-black districts based on other criteria. "I was trying to look at the overall total change to the district, not to any one specific precinct." Tr. 3.144. "I would look at the changes I made in toto to see what it did to the overall black percentage of the district . . . . It was the overall number." Tr. 3.145. "I tried to look at the additions en masse, not just a precinct." J.A. 87-88. Only when these additions led him to be "concerned about retrogressing" did he "look at the nature of the precincts [he] was adding." J.A. 87.

Sometimes the drafters did not come close to the prior black percentages in the districts, but some-

times they did. The ALBC uses figures from our trial exhibits to compare the old and new districts. *See* ALBC Br. 5a-7a. But these figures differ from the ones in the plaintiffs' own court submissions, which are the only figures in the Joint Appendix.[1] *See* J.A. 103-108. Regardless, both sets of numbers show that the drafters varied from the previous districts from about -9% up to about +9% in the House and from about -14% up to about +9% in the Senate. *See* ALBC Br. 5a-7a.

Alabama's plans successfully complied with the Voting Rights Act. The plans kept the same number of majority-minority districts in the Senate and added an additional majority-minority district in the House. J.S. App. 36, 46-48. The majority-black districts in the new plan are comparable to the districts in the old plan, which was drafted by black leaders and approved by the Democrat-controlled Legislature. *See* J.S. App. 46-56.

C. The drafters changed all the districts, majority-black and majority-white, "the least amount possible."

The drafters had many other goals, which they also accomplished. Most of the drafters' other goals had to do with keeping the new districts the same as the old ones. In fact, it was a "goal to change each

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[1] We are not sure why there are discrepancies between the plaintiffs' figures in the Joint Appendix and the figures in our exhibits in the district court. We note that the majority and dissent below also put slightly different numbers in their charts. Nonetheless, the differences are minor and do not meaningfully change the comparison.

district," whether majority-white or majority-black, "the least amount possible." J.A. 112-113. This means that "if Senate District X had these four counties," the drafters would "try to keep it as close to those four counties as possible." J.A. 113. The drafters also attempted to preserve the core of existing districts, satisfy the wishes of incumbents, and not make incumbents run against each other. J.S. App. 33.

A comparison between the old maps and new maps shows that the drafters generally accomplished their goal of consistency between the old and new districts. *See* J.A. 191-194. The unusual geographic features of the new districts are the same as they were in the prior plan. For example, SD 23 still has a triangular incursion into Conecuh County. The north/south line dividing Marengo and Clarke Counties between SD 23 and SD 24 still follows Highway 43. *Compare* J.A. 191 *with* J.A. 192. SD 24 had an "arm" stretching into Tuscaloosa County in the old plan and still has that "arm" now. *Compare* J.A. 191 *with* J.A. 192. Old SD 27 followed a jagged path through Lee and Russell Counties, and it still follows that unusual path. *Compare* J.A. 191 *with* J.A. 192.

The story is the same in the House. For example, old HD 33 east of Birmingham had a narrow "tail" running north along HD 32, and that feature remains in the new plan. *Compare* J.A. 193 *with* J.A. 194. There are many more examples that the Court can see by comparing the old and new maps.

It is unsurprising that the drafters placed such a high premium on changing all the districts, majority-black and majority-white, "the least amount possible." J.A. 112-13. In 2010, the Republican Party won

control of the Alabama Legislature for the first time since the 1800s. As one of the plaintiffs' experts testified, "when legislators draw districts, we all know that partisanship is the most important factor." J.A. 116.

D. Some changes reduced the influence of the Democratic Party.

Two significant changes in Montgomery and Birmingham reduced the influence of the Democratic Party in the state House of Representatives. There were also some minor changes in the Senate plan that altered purported "influence" districts.

Montgomery County is in the center of a broad geographic belt across the southern portion of the state—stretching from HD 71 and HD 65 in the west to HD 83 and HD 84 in the east—in which all the House districts were under-populated in 2001 and had lost significant population since then. We have reproduced a map of the old districts in the appendix to this brief that shows the under- or over-population in each district. *See* App. 12a. Under the benchmark 2001 plan, Montgomery County itself was divided into six House districts, three majority-black districts (76, 77, 78) and three other districts (73, 74, 75). J.S. App. 37. HD 78 and HD 77 were majority-black districts represented by black legislators, and they were respectively the most under-populated (-32.16%) and the fourth most under-populated (-23.12%). J.S. App. 47. HD 69 was a majority-black district in neighboring Lowndes County that was under-populated by 17%. *See* App. 12a.

Rep. Thad McClammy, a black representative from Montgomery, proposed a new map for the area that solved the under-population problem in the region. The map expanded the borders of some of the under-populated districts to consume all of the population of HD 73. J.S. App. 35. By 2012, HD 73 had become a district with a plurality black population that was represented by a freshman white Democrat named Joe Hubbard. J.S. App. 35. Rep. McClammy's map was the consensus recommendation of the legislators in the Montgomery area, except for Rep. Hubbard. *See* J.A. 100-01; Tr. 3.234. The drafters accepted Rep. McClammy's recommendation and created a "new" HD 73 in Shelby County, where the districts were over-populated by up to 60%. J.S. App. 18, 35-37; App. 12a.

A similar scenario played out in Jefferson County. The majority-black House districts that were clustered together in the Birmingham area were all under-populated. J.S. App. 37. In 2001, Jefferson County was divided into nine majority-black districts (52 through 60) and nine majority-white districts. J.S. App. 37-38. Six of the nine majority-black districts were under-populated by roughly 20% or more. J.S. App. 47. These nine majority-black districts were collectively under-populated by 76,427 people, which is the population of approximately 1.5 "ideal" House districts. DX 406 at 4-5 (chart with deviations); Tr. 2.86.

Accordingly, as they did in Montgomery, the drafters used the population of one of the under-populated districts to bring the population of the surrounding districts up to the ideal population. J.S. App. 38. The drafters chose to eliminate HD 53 be-

cause they believed that the incumbent from that district intended to retire because of his age. APX 75 at 132:9-14 (Hinaman Depo). (The incumbent later passed away. J.S. App. 12.) This change allowed the drafters to create a new majority-black district in the Huntsville area where the population had been growing. J.S. App. 37-39, 103-04.

There were also a few changes in the Senate plan that disrupted districts that had previously been gerrymandered to help elect white Democrats. The ADC specifically challenged the drafters' changes to three majority-white "influence" districts: SD 7 in Huntsville, SD 11 in east Alabama, and SD 22 in south Alabama. The district court separately addressed these challenges and found, without contravention by the dissenting judge, that these changes were not related to race. *See* ALBC J.S. App. 39-42, 61-62, 70-74, 166-71.

II. Procedural history

In the court below, the district court was "presented with one set of plaintiffs who argued about discriminatory purpose and another set of plaintiffs who argued about strict scrutiny, but no set of plaintiffs who argued both." J.S. App. 128. The ADC argued below that the lines of four specific Senate districts were race-based, three majority-white (SD 7, SD 11, SD 22) and one majority-black (SD 26). The ALBC never argued that the lines of any specific district were predominantly driven by race. To the extent that the ALBC discussed specific districts and counties, it was only to illustrate its allegation that the plans were *partisan* gerrymanders with "the

purpose and effect of minimizing the opportunities for black and white voters who support the Democratic Party." Doc. 60 ¶¶ 69-70, 72-81, 84.

After granting judgment for the state defendants on most of the plaintiffs' claims, the three-judge court held a consolidated bench trial on the ALBC and ADC's claims of intentional discrimination on the basis of race. J.S. App. 11-12; *see also* J.S. App. 278-79, 418-26. At trial, both sets of plaintiffs reiterated their "statewide" claim that the plans "systematically packed" all of the majority-black districts, showing "intentional discrimination in violation of the 14th and 15th Amendments." Tr. 1.4-5, 7. The ALBC's post-trial proposed findings of fact and conclusions of law suggested that the court find that race was the predominant factor in drawing the plans statewide, but did not suggest any fact-findings about the racial gerrymandering in any specific district. Doc. 194 ¶¶ 112-16. The ADC's post-trial filing mentioned specific districts to support its Section 2 claim and county-splitting arguments, but suggested no fact-findings about the lines of specific districts in support of their gerrymandering claim. Doc. 195-1 ¶¶ 11-15, 144, 176, 179-262.

As the district court explained, to the extent that the plaintiffs made any racial gerrymandering claim, it was a statewide one. J.S. App. 127-28. The court explained that "[t]he Black Caucus plaintiffs routinely cited decisions of the Supreme Court on claims of racial gerrymandering, but never identified which districts they alleged were racially gerrymandered and introduced little evidence to prove a discriminatory intent." J.S. App. 127. The court therefore "construe[d] the filings of the Black Caucus plaintiffs . . .

as arguing that the Acts as a whole constitute racial gerrymanders." J.S. App. 127. It rejected that claim because it found, as a factual matter, that "[r]ace was not the predominant motivating factor for the Acts as a whole." J.S. App. 140-65.

The court concluded that the ADC lacked standing to bring a statewide claim of racial gerrymandering. J.S. App. 138. It also construed the ADC's filings "to present district-specific racial gerrymandering challenges to SD 7, 11, 22, and 26," even though the ADC did not mention SD 26 in its complaint. J.S. App. 138, 171. The district court rejected those claims, concluding that race was not the predominant factor in drawing SD 7, 11, 22, or 26. J.S. App. 140, 152, 166-73.

This appeal followed.

SUMMARY OF ARGUMENT

This brief proceeds in four parts. First, we address failings in the plaintiffs' statewide legal theories. Second, we address the district court's fact-findings. Third, we address the ADC's lack of standing. And, fourth, we address whether the plans meet rational basis and strict scrutiny on a statewide basis.

I. On appeal, the plaintiffs have renewed their statewide claims against the redistricting plans "as a whole." These claims are inconsistent with this Court's precedents, which require plaintiffs to prove that the lines of specific districts were drawn because

of race. There are four compelling reasons not to change the law in the way the plaintiffs suggest.

A. Because of the Supremacy Clause, redistricters must always prioritize compliance with federal law in a plan "as a whole." But this does not mean that race was the most important factor, or even a factor, with respect to the lines of any particular district. Other redistricting criteria can still determine where redistricters draw specific lines, even if they have statewide goals related to race.

B. The Court cannot apply strict scrutiny in a meaningful way to the plaintiffs' statewide allegations. Section 5 imposed undisputed requirements on the state, which cannot be isolated from the drafters' preclearance strategy. The plaintiffs do not argue that all the majority-black or majority-white districts are problematic. And some majority-black districts are indisputably consistent with the plaintiffs' own view of Section 5.

C. There is also no remedy for the plaintiffs' claims. Vacating the plans in their entirety is inconsistent with the presumption in favor of legislative districting. Vacatur would also not lead to meaningful remedial changes. It would be error for a court to draw a new plan with the goal of creating "influence districts." And there is no reason to believe that the Republican Legislature would propose a remedial plan that intentionally helps more Democrats be elected.

D. Finally, because Section 2 already protects against "packing," there is no reason for the Court to change equal protection caselaw to address the plaintiffs' statewide claims. The plaintiffs made a

Section 2 "packing" claim below, but it failed under well-established Section 2 precedents.

II. The Court should also reject the plaintiffs' statewide claims on the facts of this case. The district court was correct that the features of the plans that the plaintiffs criticize are attributable to the 2% deviation and other race-neutral districting criteria, not the drafters' preclearance strategy.

A. The plaintiffs' competing plans do not draw majority-black districts with consistently different populations of black persons. The plaintiffs' majority-black districts have characteristics that they criticize in the drafters' plans, such as districts that are more than 70% black. Where there are major differences, they are attributable to the plaintiffs' disagreement with the drafters' race-neutral criteria. The consistent difference between the Legislature's plans and the competing plans is that the plaintiffs' plans do not comply with the 2% deviation. The ADC's chairman personally asked the district court to order the Legislature to draw new plans, "follow[ing] their own rules, except for this one person—this plus or minus one" percent.

B. The district court also explained that, on a statewide basis, race-neutral districting criteria accounts for most of the similarity between the majority-black districts in the old plan and the new plan. Voters are not fungible units that can be moved around to create artificial 50% black districts; they are tied to specific geographic locations. This is why some of the majority-black districts in plaintiffs' own plans are close to the "quota" and why the new plan

is similar to the 2001 plan, even using 2001 census figures.

Moreover, the drafters used preexisting district lines to draw the new districts, which limited the population that they could move. There are very few counties in the new majority-black districts that were not in the old ones, and vice versa. And the black population in many of the *majority-white* districts also stayed almost exactly the same. If a new district follows the lines of the old one, then it will contain the same people.

C. The district court also found that the drafters did not preserve the black population in some majority-white "influence" districts because of race-neutral criteria. The plaintiffs have done nothing to show that these districts were altered because of a "quota" or "policy." The plaintiffs' proposed plans reduce many of these districts' black populations as well. These changes are also explained, on a statewide level, by: (1) partisanship and (2) the requests of incumbent legislators. The Republican drafters had no reason to preserve black populations in districts that had been gerrymandered to elect white Democrats.

D. The district court also found that race-neutral criteria led to the county- and precinct-splitting that the plaintiffs criticize. The plaintiffs' own expert attributed this splitting to the 2% deviation. There are also good reasons to split precincts and counties—such as following municipal lines and former district lines. Although the plaintiffs produced an exhibit that identifies every precinct and county split, they have never identified any that they believe to have been split on the basis of race.

E. The district court also found that DOJ preclearance undermined the plaintiffs' statewide claims. The DOJ expressly considered whether "minorities are over concentrated in one or more districts," and the plaintiffs made the same statewide packing claims to DOJ that they are making here. DOJ preclearance indicates that the population percentages in the majority-black districts are mostly explained by the application of race-neutral criteria to concentrated black populations.

F. Finally, the four senate districts that the ADC challenged in the district court are not best explained by the drafters' purported "quota" or "policy." SD 7 and SD 11 are majority-white districts that do not even border majority-black districts, so their black population could not have been reduced to comply with a "policy" or "quota" for majority-black districts. Similarly, the only way to draw majority-white SD 22 with a higher black population is to split another district across Mobile Bay, which violates traditional redistricting criteria and was opposed by all the legislators in the area.

SD 26 is a majority-black district in Montgomery that has always been more than 70% black. The drafters preserved it as an urban district and its neighbor, SD 25, as a rural and suburban district. Because of consistent black populations in the City of Montgomery, this had the effect of raising the district's black population from 73% to 75%.

The district court did *not* find that districts of equal population could not be gerrymandered. It found that non-racial districting criteria, not the drafters' preclearance strategy, explain the aspects of

the plans that the plaintiffs dislike. This finding is amply supported by the record.

III. The district court was also correct that the ADC lacks standing to challenge the statewide plans. The ADC is making exactly the same arguments that this Court rejected in *United States v. Hays*. It has not brought a "*Shaw* claim" based on dignitary harms. And the harms that it alleges, such as precinct splits, are not "fairly traceable" to the "policy" it challenges. Moreover, the remedy that the ADC has requested—vacating the plans—will not redress the purported harms that the ADC has identified because it will not create more "integrated" districts. The ADC's dispute with these plans is political, not legal.

IV. The drafters' plans also meet rational basis and strict scrutiny. The drafters tried to avoid reducing the black population in preexisting majority-black districts as a strategy to comply with Section 5. They relied on the best evidence available to them to ensure that they did not "diminish" black voters' "ability to elect": the Democrat's redistricting practices, the views of black legislators, and the preexisting districts.

A. The drafters understood that their plans would be retrogressive if they "significantly" reduced the black population in majority-black districts. They did not want a district to "go[] from 60 percent to 51 [percent] or something like that." The goal of the drafters' strategy was to avoid such reductions.

B. The drafters had a strong basis in evidence to avoid reducing black population in majority-black districts to prove that the plans did not have a retrogressive effect. The burden under Section 5 is on the state to prove that its plans do not retrogress. DOJ's regulations and the caselaw provide that, if a plan preserves a supermajority percentage of minority voters in a district, there is no need to evaluate other factors to determine "ability to elect." The drafters had no reason to turn the question of Section 5 compliance into a battle of experts. Their strategy is consistent with how the Democrats redistricted in 2001 and how other states redistricted in this cycle.

The drafters' strategy is also supported by the text of the 2006 amendments to Section 5. By overturning *Georgia v. Ashcroft*, Congress instructed the states to focus on the "comparative ability of a minority group to elect a candidate of choice" between the old and new plans. This language forbids changes that "diminish" safe districts by turning them into more competitive districts, just as much as it forbids changes that turn safe districts into hopeless districts. Alabama's preexisting districts were in the 50s, 60s, and 70s in black population. Any substantial drop in these numbers would necessarily "diminish" the districts by making them more competitive.

The drafters' strategy is also supported by the history of the Section 5 reauthorization. A law professor told Congress that its proposed statutory language would "lock into place minority districts in the south at populations" that he said would "not serve minority interests." But Congress expressly approved of redistricting plans that "maintained the black vot-

ing age population in the [] majority black districts ... at almost exactly their pre-existing levels."

C. The drafters' strategy also helped them prove that the plans were not motivated by a "discriminatory purpose," broadly defined. In 2006, Congress imposed the requirement that the state affirmatively disprove that its plans were motivated by a discriminatory purpose. In light of this change, the drafters were not free to drastically alter the majority-black districts, disregard the advice of black political leaders, flood majority-black districts with white voters, or create bare-majority black districts.

D. The Court should not require legislators to conduct a "functional analysis" for every majority-black district. That would increase the federalism costs of Section 5 and require the use of race in highly subjective ways. States should have the leeway to comply with Section 5 by reference to objective criteria. The plans are constitutional under any standard of review.

ARGUMENT

I. The plaintiffs' statewide claims fail as a matter of law.

As a preliminary matter, we agree with the United States that the plaintiffs cannot make a race-based districting claim to the plans as a whole. *See* U.S. Br. 15-20. *See also* Lawyers Comm. Br. 5-8, 16-26. We believe the right rule is that any harm from race-conscious redistricting only manifests itself when specific district boundaries are warped along racial lines. *See* U.S. Br. 17. The statewide challenges that the plaintiffs bring do not show that kind of

harm because they do not attempt to prove that race predominated with respect to the lines of any particular district. No judge in the lower court agreed with the plaintiffs' statewide theories, and for good reason.

A. The plaintiffs' theories equate the abstract goal of complying with the Voting Rights Act with an improper fixation on race.

The plaintiffs' theories rest on the notion that, whenever a non-lawyer state legislator testifies that he prioritized compliance with the Voting Rights Act as a general matter, race is *per se* the driving factor statewide. But, with respect to a plan overall, a drafter must always, in the abstract, prioritize compliance with the Voting Rights Act. This is not a confession to gerrymandering; it is a recognition that federal law is supreme.

That is one reason why this Court has always evaluated a claim of racial gerrymandering with a district-by-district approach. A plan does not warrant strict scrutiny unless "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*." *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added). A plaintiff must introduce evidence about specific districts to show that "race predominated over legitimate districting considerations." *Bush v. Vera*, 517 U.S. 952, 965 (1996). As the United States explains, the Court has required plaintiffs to establish that race was predominant with respect to a specific district "even in the

presence of evidence that the plan drafters had overarching statewide goals relating to race." *See* U.S. Br. 16 (citing *Vera*, 517 U.S. at 965-75; *Miller*, 515 U.S. at 917; *Shaw v. Hunt*, 517 U.S. 899, 904-907 (1996); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999)).

Only district-specific litigation can account for the practical and political complexities of balancing compliance with federal law with other objectives. Small "p" political factors—communities of interest, former district lines, municipal boundaries, county lines, residences of incumbents—can influence the configuration of a particular district even if race also has an impact. Indeed, when questioned about specific districts, the drafters of Alabama's plans invariably explained that consistency with their preclearance strategy was an added benefit of a district-specific decision that they also made for political and practical reasons. *See, e.g.*, J.A. 110 (various benefits of expanding SD 23 and 24 south instead of north or east); J.A. 25 (same).

Because "a State is permitted great flexibility in deciding how to comply" with the Voting Rights Act, compliance may not require a plan's drafters to make any specific decisions based predominantly on that goal. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 520 (2006) (Scalia, J., dissenting and concurring) ("LULAC"). For example, 213,000 people live in Birmingham and 73% of them are black. *See* App. 10a. Even though federal law requires that the City be divided into several compact majority-minority districts, it does not tell a plan's drafters where to draw the lines. And the drafters testified at trial that the dividing lines between these majority-black districts were extensively negotiated

by the area's legislators. *See, e.g.*, J.A. 76-77, 83. Although the Voting Rights Act may have had some bearing on the configuration of these districts, other factors were also at play that cannot be accounted for without district-by-district litigation.

In short, the Voting Rights Act *requires* state lawmakers to be race-conscious and to draw districts in which black voters can elect representatives of their choice. *See* NAACP Br. 8-11. If a statewide racial gerrymander can be proven by abstract statements like "priority is to be given to the Voting Rights Act," ALBC Br. 26, or "the Voting Rights Act . . . makes it almost impossible to keep all counties intact," ALBC Br. 44, then the Voting Rights Act is a trap for honest lawmakers.

B. Strict scrutiny is not meaningful on a statewide basis.

Moreover, the narrow-tailoring aspect of strict scrutiny is impossible to apply in a meaningful way to the kind of claim that the plaintiffs have made. This is so for two reasons.

First, there is no way to isolate the effect of the drafters' preclearance strategy. The plaintiffs argue that the drafters of these plans were wrong to comply with the Voting Rights Act by maintaining majority-black districts as they had been. We disagree, as explained in Part IV below. But, more importantly, it is undisputed that Section 5 required the drafters to maintain (1) the same number of majority-black districts as in the benchmark plan (2) with large enough black populations to elect the black population's can-

didate of choice. As the United States also notes, "there is a substantial chance that the obligations of Section 2 and Section 5 in Alabama's redistricting are coextensive." U.S. Br. 28.

There is no way to disentangle the effects of the purportedly improper motive—maintaining black population percentages—from proper motives on a statewide basis. The plaintiffs' briefs suggest that *every* mention of the Voting Rights Act in the drafters' testimony is a reference to black-population-percentages, which ignores the undisputed obligations that the Voting Rights Act imposed. *See, e.g*, ALBC Br. 44 (county-splitting); ALBC Br. 56 n. 97 (relative absence of 30% black districts). There are also scores of majority-white districts in the plans that the drafters' preclearance strategy could not have affected at all.

Second, even on the plaintiffs' theories, at least some of the majority-black districts have the right black population, regardless of how that population arrived there. The two groups of plaintiffs do not even agree on which districts pose a problem. The House districts that the ALBC criticizes as being too close to the "quota" are not, with two exceptions,[2] the same districts that the ADC criticizes as having "extremely high" black populations. *Compare* ALBC Br. 30 *with* ADC Br. 31.

HD 53 is the best example of a district that complies even with plaintiffs' view of Section 5. The ALBC criticizes the drafters' decision to move HD 53 from Birmingham to Huntsville while, at the same

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[2] The two exceptions are HD 67 and HD 55. We discuss HD 67 extensively below.

time, keeping its black population percentage close to 55%. But, because the black population skews younger than the population overall, the new, compact district in Huntsville contains a *bare majority* of black voters—something *the plaintiffs* say Section 5 requires. *See, e.g.*, J.A. 63-65 (plaintiffs' expert testifying that an ability-to-elect district must have at least 51% black voter age population). There are several other districts like this in the plans, such as HD 54, HD 84, and HD 85.

C. There is no judicial remedy.

There is also no appropriate judicial remedy for the statewide claims that the plaintiffs have brought. The ALBC's brief does not suggest any remedy at all. For example, the ALBC spends much of its brief criticizing the drafters' decision to resolve the underpopulation in Birmingham by dividing HD 53's population among the remaining districts. But this move also allowed the drafters to create a new majority-black district in Huntsville. The ALBC does not explain what should happen to this new majority-black district if it prevails.

The ADC argues that the plans should be invalidated in their entirety. But it solves nothing to invalidate a statewide plan for the reasons that the plaintiffs have raised. A state must have legislative districts. And, if a federal court undoes a plan as a racial gerrymander, it must be able to suggest ways in which the districts could be redrawn to eliminate the constitutional problem. Otherwise, there will be neither a court-ordered remedy nor any standard by which to evaluate a state-proposed remedy.

The plaintiffs' failure to identify a discrete remedy is an especially significant problem given the inherently legislative nature of redistricting. The Court has long recognized that "'reapportionment is primarily a matter for legislative consideration and determination.'" *White v. Weiser*, 412 U.S. 783, 794 (1973) (quoting *Reynolds*, 377 U.S. at 586)). It requires drawing sometimes arbitrary, "inconsistent, illogical, and ad hoc" lines between groups of voters. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)(plurality). *Accord id.* at 306-07 (Kennedy, J., concurring in the judgment) (noting "lack of comprehensive and neutral principles for drawing electoral boundaries"). Courts that become entangled in redistricting "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring in the judgment). *See also LULAC*, 548 U.S. at 415-16 ("[A] lawful, legislatively enacted plan should be preferable to one drawn by the courts.").

The ADC's suggestion that the Court vacate the plans in their entirety is inconsistent with these principles. The Court has recognized that even a limited judicial districting remedy "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. In the context of redistricting, therefore, lower courts must use legislative plans as the starting point, changing them only as necessary to remedy specific violations of federal law. *See Perry v. Perez*, 132 S. Ct. 934, 943-45 (2012) (per curiam) (criticizing district court's interim remedial plan for "unnecessarily ignor[ing] the State's plans in drawing certain individual districts").

Because the plaintiffs have not shown that race warped the lines of any specific district, there is no reason to believe that a court-drawn plan would create more "racial balance" overall. The Voting Rights Act does not require the creation of coalition, influence, or other non-majority-minority districts. *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009). Nor does the Voting Rights Act require the state to maximize the political influence of a racial minority. *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). A federal court would thus have "no basis" to "set out to create a minority coalition district" as part of a remedial plan, "rather than drawing a district that simply reflected population growth." *Perry*, 132 S. Ct. at 944. And, as we show in Part II below, similar black population percentages are likely in any plan because of the demographics of Alabama.

There is also no reason to believe that a legislative do-over would create greater racial balance or, more to the point, any additional districts in which black voters can combine with white voters to elect a white Democrat. The plaintiffs have not suggested how the drafters could meet their legitimate policy goals—foremost among them, consistency between the old and new districts and the 2% deviation—in a way that would create more "integrated" districts. Nor have the plaintiffs suggested why the (almost certainly) Republican majority in the next Legislature would propose altering the existing plans in a way that would help Democrats be elected. *Cf. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (noting the "element of futility" inherent in any "judicial attempt to invalidate a law because of the bad motives of its

supporters"). A statewide do-over would put us, at most, in the same place we are now.

D. Section 2 already protects against the dilution of black voters' statewide influence.

Finally, Section 2 of the Voting Rights Act already protects against the dilution of minority influence by "packing" minority voters into too few districts. *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). There is thus no reason for the Court to address these statewide "packing" claims under new equal-protection theories.

The plaintiffs made a Section 2 "packing" claim in the district court. But it failed, in part, because the drafters' plans provide black voters proportional representation in the Legislature. *See De Grandy*, 512 U.S. at 1014 ("[W]e do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity"). According to the 2010 Census, the voting-age African-American population of Alabama is about 25% of the total voting-age population. The Senate plan creates 8 majority-black districts, or 22.9% of the total of 35, and the House plan creates 28 majority-black districts, or 26.7% of the total of 105. On the other hand, the plaintiffs' proposed plans "actually create fewer opportunities for black voters to elect the candidates of their choice." J.S. App. 112. Like their Section 2 claims, the plaintiffs' racial gerrymandering claims request that the Court maximize the number of Democratic districts, not ensure fairness for black voters.

* * *

Both groups of plaintiffs in this litigation rely on statewide theories that are inconsistent with this Court's caselaw. Except for the four Senate districts that the ADC challenged at trial, the plaintiffs "never identified" any districts that "they alleged were racially gerrymandered." J.S. App. 127. They did not introduce any evidence about specific districts. They did not propose, in their post-trial briefing, fact-findings about specific districts. Many of the districts they discuss in their briefs have never been addressed at any other point in this litigation. To the extent they have district-specific arguments, they have waived them. The district court crafted a fact-based response to the plaintiffs' scattershot allegations that race explains the statewide plans "as a whole." But it could also have rejected these shifting statewide claims as a matter of law.

II. The plaintiffs did not show that race was the predominant factor statewide or in any specific district.

If the Court wants to entertain the plaintiffs' claims that the plans are improperly motivated by race "over all," then those claims should be rejected. The district court gave the only response to the plaintiffs' statewide claim that the facts would allow. The district court found, as a factual matter, that racial considerations did not predominate statewide. J.S. App. 144. The dissenting judge similarly rejected

the plaintiffs' statewide claim but did not meaningfully engage with the claim as the plaintiffs formulated it, suggesting instead that the plaintiffs should have challenged specific districts. *See* J.S. App. 227.

In this section, we evaluate the record evidence to explain why the district court found that race was not the overriding factor statewide and, instead, suggested that the 2% deviation predominated. This finding was not the error that the plaintiffs and the United States believe it to be. Instead, it is a compelling explanation for the specific features of the drafters' statewide plans that the plaintiffs say they dislike. First, we compare the drafters' plans to the plaintiffs' competing plans, which all use a 10% instead of 2% deviation. Second, we discuss the similarities between the majority-black districts in the old and new plans, which are mostly explained by nonracial considerations as a statewide matter. Third, we address the reasons the drafters did not preserve majority-white "influence" districts as a statewide matter. Fourth, we discuss the county-splitting and precinct-splitting that the plaintiffs now say is an indication that race predominated statewide. Fifth, we discuss the significance of DOJ preclearance. Lastly, we apply this statewide discussion to the four specific Senate districts that the ADC plaintiffs challenged and about which there is actual district-specific evidence in the record. All of this evidence supports the district court's fact-finding that race did not predominate statewide or as to any specific district that the plaintiffs actually challenged.

A. The consistent difference between the Legislature's plans and the plaintiffs' competing plans is the standard of deviation, not the population of the majority-black districts.

The place to start in evaluating the district court's fact-finding is by comparing the Legislature's plans with competing plans that the plaintiffs proposed during the legislative process.[3] "In a case such as this one," a plaintiff "must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and "that those districting alternatives would have brought about significantly greater racial balance." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (emphasis added).

If the drafters' strategy to comply with Section 5 were the driving factor for the plans overall, it would be easy to prove: the plaintiffs would simply need to propose a plan that meets the drafters' race-neutral

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[3] These are plans proposed in the Legislature as alternatives to the Republicans' plan by members of the ALBC, such as Rep. McClammy, Rep. Knight, and Senator Sanders, and by Dr. Joe Reed, the head of the ADC. The ALBC cites APX 20-23, which include voting-age population statistics for the plans drafted by William Cooper and introduced by Rep. Knight in the House as HB16 and Senator Sanders in the Senate as SB5. ALBC Br. 10 & n.26. We instead use the total black population percentages in C-46 (Knight Plan) and C-47 (Sanders Plan) for ease of comparison with the other alternative plans, which lack voting-age statistics. *See* C-45 (McClammy House Plan), C-42 (ADC House Plan), C-48 (ADC Senate Plan). We refer to Dr. Reed's plans as "the ADC plans."

criteria. *See id.* But the plaintiffs have always refused to propose a plan that meets those criteria, especially the 2% deviation. Instead of race, the most consistent statewide difference between the plaintiffs' plans and the Legislature's plans is that none of the plaintiffs' proposed plans comply with the standard of population deviation that the Legislature adopted.

We have created the charts below, which compare the black population percentage in each majority-black House and Senate district under the various plans. Blank entries exist where the plan at issue does not create a majority-black district. A similar chart comparing the black population percentage in every district, both majority-black and majority-white, is in the appendix.

Comparison of black population percentages in majority-black House districts

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
19	61.25%	67.07%	67.01%	75.39%
32	60.05%	58.40%	56.68%	
49				62.65%
52	60.13%	62.27%	61.34%	54.07%
53	55.83%	62.00%	56.61%	55.86%
54	56.83%			58.72%
55	73.55%	62.92%	66.66%	64.03%
56	62.14%	61.06%	58.16%	54.02%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
57	68.47%	62.27%	61.89%	60.27%
58	72.76%	66.20%	76.98%	61.09%
59	76.72%	66.62%	64.85%	61.27%
60	67.68%	62.26%	65.38%	59.55%
67	69.15%	69.21%	68.63%	69.43%
68	64.56%	53.87%	55.19%	56.29%[4]
69	64.21%	57.56%	56.92%	57.62%
70	62.03%	61.18%	61.66%	57.21%
71	66.90%	60.42%	59.43%	54.45%
72	64.60%	60.37%	55.37%	56.25%
76	73.79%	75.62%	64.36%	83.58%[5]
77	67.04%	67.34%	62.31%	59.38%
78	69.99%	73.03%	74.21%	58.70%
82	62.14%	61.14%	57.22%	53.63%
83	57.52%	61.87%	55.99%	
84	52.35%	51.40%	52.00%	71.97%[6]
85	50.08%	47.96%	53.94%	54.21%

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[4] Rep. Knight renumbered many of his districts, making comparison difficult. Where it is possible to identify a particular district in Knight's plan that covers the same geographical area as a district in the other plans, we have included the black population for that district and noted the new number. Rep. Knight renumbered HD 68 as HD 90.

[5] Rep. Knight renumbered HD 76 as HD 73.

[6] Rep. Knight renumbered HD 84 as HD88.

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
97	60.66%	63.00%	63.59%	57.19%
98	60.02%	60.22%	61.57%	63.75%
99	65.61%	62.92%	63.55%	57.98%
103	65.06%	62.08%	63.03%	62.45%[7]

Comparison of black population percentages in majority-black Senate districts

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
18	59.10%	58.49%	61.32%
19	65.31%	65.30%	62.89%
20	63.15%	62.82%	65.10%
23	64.84%	57.75%	61.23%
24	63.22%	56.90%	60.43%
26	75.13%	71.28%	68.44%
28	59.83%	51.55%	60.38%
33	71.64%	71.83%	65.83%

If the drafters had the "predominant" statewide goal of "packing" districts with "supermajority percentages" of black persons, then we would expect to see stark differences between their plans and the plaintiffs' plans, which do not share that goal. But

[7] Rep. Knight renumbered HD 103 as HD101.

we do not. In the House plan, the Legislature's plan has 23 districts that are over 59% black; Rep. McClammy's plan has 22. The only real difference in the House is in the Birmingham districts (HD 52-60) because the plaintiffs' plans manipulate the area's black population to create a new 30% black district that could be won by a white Democrat (HD 54), eliminating a majority-black district from the statewide plan.

The ADC says it is frustrated by the "staggeringly high black populations" in the drafters' majority-black districts, "including many in the 70-77% range." ADC Br. 2-3. But most of the Legislature's majority-black districts are similar to the ADC's. The ADC's plan provides for 2 House districts with black population percentages above 70%; the Legislature's plan has 4. In eight of the majority-black House districts, the ADC's proposed plan has a higher black-population percentage than the Legislature's. (HD 19, 52, 53, 58, 78, 85, 97, 98). In the Senate, all of the ADC's proposed majority-black districts are more than 60% black.

Moreover, some of the largest racial differences between the plans are directly traceable to non-racial criteria. The ADC drew SD 33 as 65.83% black instead of 72% black only because it split Mobile and Baldwin Counties and extended SD 34 across a large body of water, Mobile Bay. *See* J.A. 201 (ADC's map). The ALBC's brief also suggests splitting these counties across Mobile Bay to lower SD 33's black population percentage. *See* ALBC Br. 10 & n.28. Similarly, in the House, the ADC's efforts to manipulate the black population percentages across the southern middle of the state led it to change a host of districts

from how they were under the 2001 plan. *See* J.A. 202 (ADC's map). For example, HD 68 is in a completely new location on the border of Mississippi instead of in Monroe and Conecuh counties. *See* J.A. 202 (ADC's map), 194(2001 map).

Rep. Knight's House plan and Senator Sanders' Senate plan were drawn by the plaintiffs' expert William Cooper "to split as few counties as possible." *See* Tr. 2.111. These plans put incumbent legislators in the same districts. *See id.* Rep. Knight's plan changes the existing House districts so much that it is difficult even to identify which districts in his plan correspond to the districts in the other plans. Nonetheless, the black population percentages in Rep. Knight's majority-black districts go as high as 83% in Montgomery and are similar to those in the drafters' plan in many of the majority-black House districts. Senator Sanders' Senate plan is almost exactly the same as the drafters' in four of the eight districts (18, 29, 20, 33).

The greatest and most consistent statewide difference between the drafters' plans and the competing plans is the standard of deviation, not the racial composition of majority-black districts. As the district court explained, the reason the plaintiffs have never proposed a 2% plan is self-evident: the 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." J.S. App. 146. The plaintiffs' plans instead use a more forgiving 10% deviation that allows them to manipulate district lines to help elect the maximum number of white Democrats. At trial, the ADC's chairman personally asked the district court, as a remedy, to order the Republicans to draw new plans, "fol-

low[ing] their own rules, except for this one person—this plus or minus one" percent. Tr. 2.172.

B. The majority-black districts are similar between the old and new plans mostly because of nonracial factors.

Because the plaintiffs never proposed a plan that meets the drafters' race-neutral districting criteria, they have no counterproposal to show that race was the driving force for the drafters' plans "over all." Instead, the plaintiffs cite the consistency with which the drafters kept the racial percentages of the majority-black districts roughly the same. *See* ALBC Br. 30-33. And, even then, the plaintiffs cherry-pick the districts that they discuss, ignoring those districts with significant variations between the old and new plans. *See id.* 30-41, 49-53. This method of attempting to show that race was the driving factor in the state overall, or in any particular district, has serious flaws. As the United States notes, "some majority-black districts deviated significantly from the goal of maintaining the same percentage of black residents," and "in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles." U.S. Br. 20-21. The district court expressly found that the application of race-neutral districting principles to fixed demographics explains most of the similarity between the old and new majority-black districts. J.S. App. 143-44.

1. The similarities between the old and new districts are mostly explained by demographic reality.

From reading the plaintiffs' briefs, one gets the misimpression that black population is spread evenly throughout Alabama. In fact, many areas of Alabama have almost no black population. *See* App. 7a-9a (showing black population in each county). Instead, the black population is concentrated around the City of Birmingham and in counties across the middle and southern sections of the state. These counties include Greene (81.8% black), Sumter (75.2% black), Perry (69.0% black), Dallas (70.0% black), Wilcox (72.8% black), Lowndes (73.9% black), Montgomery (55.4% black), Macon (83.5% black), and Bullock (70.6% black). App. 7a. Likewise, the City of Birmingham is 73.4% black. App. 10a-11a. And Birmingham's western suburbs have similar populations, such as Bessemer (71.2% black), Fairfield (94.6% black), and Midfield (81.6% black). App. 10a. The population of these areas did not change just because district lines were shifted.

Because "[v]oters are not fungible commodities that can be moved anywhere in a state," the district court explained that the majority-black districts mostly reflect "racial groups tied to particular geographical locations." J.S. App. 145. This demographic reality explains why the black populations of some of the *plaintiffs'* proposed districts are similar to the drafters' purported "quota." The black populations of several of the ADC's proposed districts are only one percentage point away from the "quota," including HD 53 (0.90 difference), HD 58 (0.88 difference), HD

67 (0.51 difference), HD 70 (0.17 difference), HD 78 (0.05 difference), HD 82 (0.09 difference), HD 83 (0.93 difference), HD 84 (1.39 difference), SD 18 (1.4 difference), and SD 33 (0.98 difference).[8] ALBC Br. 5a-7a; *supra* 34-36. Senator Sanders' plan for SD 28 is only 0.57 above the "quota" of the 2010 numbers in the 2001 lines (51.55 compared to 50.98), making him much closer to the "quota" than the Legislature's plan (59.83). *Id.*

The district court was making the same point when it compared the demographics of the 2001 districts, using 2001 figures, to the demographics of the new districts, using 2010 figures. J.S. App. 46-56. The court used the comparison to illustrate that "the percentages of the black voting-age populations in the majority-black districts . . . remain relatively constant" over time. J.S. App. 182. Although the ALBC argues that this comparison was an error, the comparison is not based on the "wrong table." ALBC Br. 36-37. The district court was simply making a point that the ALBC does not appreciate: the black population figures in the Legislature's plans were mostly determined by historical residential patterns.

In fact, the percentage of black population in these districts has been stable ever since the court-ordered plan in 1993. J.S. App. 21, 46. Although population has increased in some areas and declined in others, the racial demographics of these areas have not changed.

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[8] These are comparisons between the figures in the ADC plan and the "quota" for each district in the appendix to the ALBC brief. As we have explained already, *supra* 9 n.1, the figures are a little different if one uses the chart in the Joint Appendix.

2. The similarities between the old and new districts are also explained by the drafters' race-neutral goal of changing every district "as little as possible."

The drafters' race-neutral districting criteria also worked to keep the demographics of the districts roughly the same. Changing all the districts "as little as possible" was an express goal. The drafters also wanted to preserve the cores of districts and prevent incumbents from having to run against each other. The Court has recognized that these goals are an important part of redistricting. *See Vera*, 517 U.S. at 977 ("maintaining communities of interest and traditional boundaries"). In fact, most *court-drawn* plans are also "least-change" plans that preserve as much as possible from the most recent plan. *See* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1161 (2005).

The record includes exhibits that break down each district by county and identify the number of people in each portion of a county within each district. DX 408 (2001 Senate), DX 401 (2012 Senate), DX 412 (2001 House), DX 404 (2012 House). The old majority-black Senate districts covered all or part of 24 counties. DX 408. Only two of those counties are no longer part of those districts. *Compare* DX 408 *with* DX 401. And, of the 26 counties included in the new majority-black Senate districts, only 4 were not already part of a majority-black district under the old plan. *Compare* DX 401 with DX 408. Only 1% of the people in the old majority-black districts live in

counties that are no longer part of those districts in the new plan. *Compare* DX 408 *with* DX 401. And only 5% of the people in the new majority-black districts live in counties that were not part of the districts in the old plan. *Compare* DX 401 *with* DX 408.[9]

And a comparison of the House districts shows an even smaller difference between the counties in the old and new plans. The new majority-black House districts encompass the same counties involved in the old districts. *Compare* Exh. 404 *with* Exh. 412. The new majority-black districts extend to parts of only four additional counties, and the population from those counties is only 1% of the total population in the new majority-minority districts. *Compare* Exh. 404 *with* Exh. 412.[10]

The district court explained that "more than 90 percent of the total black population remained in the same kind of district where they had resided earlier." J.S. App. 151. A cursory glance at the statewide

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[9] A comparison of DX 408 and DX 401 reveals that only Autauga and Bibb Counties were part of the majority-black Senate districts in 2001 but not 2012. In 2001, those counties contributed a total of 10,480 people, or 1%, of the 992,983 people in the 2001 majority-black Senate districts. DX 408. A similar comparison reveals that only Butler, Washington, Pickens, and Houston Counties were part of the majority-black districts in 2012 but not 2001. *Compare* DX 408 *with* DX 401. In 2012, those counties contributed a total of 53,613, or 5%, of the 1,089,323 people in the 2012 majority-black Senate districts.

[10] A comparison of DX 404 and 412 reveals that only Baldwin, Washington, Pickens, and Tallapoosa Counties were part of the majority-black House districts in 2012 but not 2001. In 2012, these counties contributed a total of 13,020 people, or 1%, of the total 1,269,931 people in the 2012 majority-black House districts. DX 404.

maps confirms the import of these statistics: the new House and Senate districts look substantially similar to the old districts and share the same unusual features. J.A. 191-94. Even within each county, the old and new districts occupy close to the "same space." J.A. 81.

The goal of changing each district "as little as possible" likely explains why the racial percentages of many of the *majority-white districts* are substantially the same between the old and new plans. The drafters had no goal to preserve black populations in majority-white districts, but the racial percentages in many of the majority-white House districts are almost identical between the old and new plans nonetheless:

Comparison of black population percentage in selected majority-white House Districts under old and new plans[11]

House Districts	2010 Black Population in New Districts	2010 Black Population in Old District Lines
10	16.18%	16.22%
16	10.38%	10.73%
22	5.74%	5.78%
25	15.99%	16.17%
35	16.08%	15.45%
41	11.97%	10.92%

[11] Figures for the new districts come from App. 1a-4a. Figures for the 2010 black population in old district lines come from our exhibits. *See* DX 406.

House Districts	2010 Black Population in New Districts	2010 Black Population in Old District Lines
49	12.92%	11.92%
66	25.16%	27.26%
75	26.43%	27.61%
89	32.00%	32.53%
90	34.65%	35.54%
93	17.11%	17.83%
104	15.79%	15.35%

The black population percentage of these majority-white districts remained the same, despite the fact that the drafters had to depopulate them by as much as 10.43% (HD 10), 42.68% (HD 25), 60.76% (HD 41), and 32.11% (HD 75). DX 406.

Because the drafters "used existing House and Senate districts to draw the new district lines," their "choice of which voters to add or subtract from each district was limited by which populations abutted the existing districts." J.S. App. 145-46. This limitation worked to keep the black population percentages the same in the majority-black districts far more than any focus on race. If the Legislature draws a new district in the same geographical area as the old one, it will contain the same or similar people. This is logic, not race-based districting. *See* Lawyers Comm. Br. 20-21.

3. Changes to the majority-black districts were consistent with other race-neutral principles.

The district court also explained that, when the drafters changed majority-black districts, they did so based on race-neutral redistricting criteria. J.S. App. 142-143. SD 23 changed to end the unnecessary splits of Lowndes, Perry, and Autauga counties. *Compare* J.A. 191 with J.A. 192. SD 26 contracted from the sparsely populated rural areas south and east of the City of Montgomery and became a more compact, urban district.

The ALBC argues that the drafters' decision to move HD 53 from Birmingham violated traditional redistricting criteria. But the drafters intentionally chose to consume the district of an older representative, who was in poor health and who they believed would not run again.[12] APX 75 at 132:9-14 (Hinaman Depo.). This decision also allowed the redistricters to preserve the core and character of surrounding districts, which were under-populated by more than a full House district. The plaintiffs' plans also use the population of an under-populated majority-black House district to repopulate the other districts, but they create a majority-white "influence" district (HD 54) in Birmingham for the first time instead of a replacement majority-black district in Huntsville.

Race-neutral districting criteria also presumably explain why the racial composition of many of the plaintiffs' proposed districts is very similar to the

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[12] This representative, Demetrius Newton, later passed away.

drafters' districts, even where those percentages differ substantially from the former districts. For example, the black population percentages in new majority-black SD 19 and SD 20 are about 10 percentage points lower than they were in the old districts. But all three competing Senate plans draw these districts within a few percentage points of each other. *See supra* 34-36. Similarly, the ADC's plan for SD 28 is less than one percentage point different from the Legislature's, but both are about 10 percentage points higher than the old district. As the chart above shows, *supra* 34-36, the black population percentage in most of the majority-black districts is similar across the competing plans.

* * *

HD 67 is a House district that *both* plaintiffs discuss in their briefs. *Compare* ALBC Br. 30 *with* ADC Br. 31. But it is also the most obvious example of why the plaintiffs' focus on population statistics does not show that race predominated. HD 67 was a one-county district in the former plan, and it is essentially a one-county district in the new plan. DX 404, 412. That county, Dallas, has 43,820 people in it, which is only about 1,000 people short of an ideal House district. And 70% of the people in Dallas County are black. App. 7a. Any plan for HD 67 that does not seriously disrupt the district's prior lines will thus be around 70% black, whether or not race is a consideration.

But, even if a line-drawer did not share the drafters' concern with continuity between the old and new plans, HD 67's black population would be almost im-

possible to change because of demography. Almost all of the counties that surround Dallas County are also 70% black, *see supra* at 2, which makes it highly improbable that anyone would draw a district with a meaningfully different black population percentage regardless of the neutral principles he or she applied. Contrary to the dissent's declaration that "[o]ne factor and one factor alone[:] . . . race" explains HD 67's black population percentage, it would have taken a gerrymander to *change* that district's racial demographics. J.S. App. 219. And, sure enough, HD 67 is 69% black in *every* proposed plan. *See* App. 3a.

The plaintiffs have not introduced any evidence to show that the similarities between all, most, or even many of the old and new districts are explained by a "quota" or "policy" instead of the application of race-neutral districting criteria to the unchanged demographics of Alabama.

C. Nonracial considerations changed the "white Democratic districts."

The district court's finding that race did not predominate is also supported by evaluating majority-white "influence" districts. In the court below, the plaintiffs and their witnesses argued that the plans were predominantly motivated by race because they reduced the black population in "white Democratic districts." J.A. 116. The plaintiffs now refer to these districts in more anodyne terms: "districts in which blacks had been between 30% and 50% of the population," ALBC Br. 9, and "inter-racial coalition districts," ADC Br. 17. But they still mean "white Democratic districts."

The plaintiffs have never shown that these majority-white districts were changed because of a "quota" or "policy" for the majority-black districts. We address the three Senate "influence" districts that the ADC challenged in Section F below. The plaintiffs also complain that the drafters reduced the black population below 30% in six House "influence" districts.[13] *See* ALBC Br. 9; ADC Br. 17-18. But so did many of the competing plans. No proposed plan preserves HD 45 or HD 61 as districts with more than 30% black population. *See* App. 2a, 3a. And only one of the three competing House plans preserves HD 6, HD 38, HD 73, or HD 74 as 30% black "influence" districts. *See* App. 1a-3a. Moreover, the drafters clearly dropped the black percentage of HD 6 because they created a *new* majority-black district in the Huntsville area (HD 53), not because they were preserving the population of an existing district. The black population of the only preexisting majority-black district in the area, HD 19, declined from 69% to 61%. *See* ALBC Br. App. 5a.

The district court gave two main answers for why the drafters did not maintain preexisting levels of black population in "white Democratic districts" on a statewide basis. *See* J.S. App. 142. The plaintiffs have not even addressed these answers, much less refuted them.

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[13] The plaintiffs do not explain why they use 30% (ALBC) and 29% (ADC) as the cutoff.

1. Partisanship

The district court's main answer for why the drafters did not preserve or create "white Democratic districts" was partisanship. J.S. App. 161. That answer is obviously correct. "[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Cromartie*, 526 U.S. at 551. Here, the plaintiffs' expert testified that "[b]lacks vote overwhelmingly 90 percent or more for Democrats, and everybody in Alabama knows that." J.A. 118. In fact, according to the same plaintiffs' expert, "[t]he major way that you know how a precinct has voted in most of Alabama is the percentage of blacks in that precinct." J.A. 118.

Although the drafters of these plans denied that they had any systematic goal to eliminate Democrats, they also consistently testified that they had to craft plans that would pass the Legislature. *See* App. 27-28; *see also* J.S. App. 46. The Legislature was controlled by Republicans, and these plans were passed on party-line votes. J.S. App. 59, 161. Faced with a choice between removing voters from Republican-controlled districts to repopulate the majority-black districts or removing Democratic voters from "white Democratic districts," the Republican drafters understandably chose the latter option. As the district court explained, "under the new plans, the number of Republicans in the Alabama House would likely increase from 66 representatives to 68 to 70 representatives and that the number of Republicans in the

Senate would increase from 22 senators to 23 to 25." J.S. App. 101.

To be clear, we are not suggesting that partisanship drove the plans overall, only that the Republican drafters had no reason to preserve or increase the black population in "white Democratic districts" as they equalized population between the districts. Partisanship explains why the drafters were content to solve Montgomery's under-population problem by moving Democrat-controlled HD 73 to Republican Shelby County. And partisanship explains why the drafters solved the under-population problem in Birmingham by moving HD 53 to Huntsville, instead of gerrymandering a "white Democratic district" in the Birmingham area as the competing plans suggest. As one Senator from Birmingham testified, this decision ensured that "the county would be controlled by the people in [the Republican] party." J.A. 43.

2. Incumbent preferences

Similarly, the district court explained that the drafters removed black population from "white Democratic districts" in ways that incumbent legislators wanted. *See* J.S. App. 142, 158, 167. Sen. Dial testified that he wanted to make the redistricting process "more transparent" than it had been in the past, with input from other legislators about how they wanted their districts changed. J.A. 21, 25-28. Rep. McClendon likewise offered to meet with each representative and worked with those who brought plans or concerns to him. J.A. 99-100 (Mobile), J.A. 100-01 (McClammy in Montgomery); *see also* Tr. 3.120-21.

For this reason, black legislators had an outsize influence in how their own districts were repopulated. They universally requested that their districts be repopulated in ways that maintained or increased the black population at the expense of "white Democratic districts." For example, Senator Sanders of SD 23 suggested repopulating his district by taking all of Lowndes County (73.9% black) instead of Autauga County (18.3% black). J.A. 24-26; App. 7a-8a. And HD 73 was moved from Montgomery because black legislators from the Montgomery area wanted to expand the borders of their under-populated districts to consume all of HD 73's population. J.S. App. 35.

There is no evidence that black legislators were focused on race when they made these suggestions. Instead, it is much more likely that these legislators wanted to repopulate their districts with communities of interest that were demographically, economically, and politically similar to the communities that they already represented. The effect was to put contiguous black communities together in the same district, instead of splitting them between districts as in the Democrats' 2001 gerrymander.

D. County and precinct splits are better explained by the need to equalize population than by racial considerations.

The plaintiffs argue that the county and precinct splits in the drafters' plans are an indication that the drafters' foremost concern was race. But, as the district court explained, there are several factual problems with this theory.

The first is that the plaintiffs' own expert, William Cooper, attributed the raw amount of county and precinct splitting to the 2% deviation, not race. His report, Doc. 125-11, attests that the 2% deviation "forced the legislature to subordinate traditional redistricting principles such as avoidance of county and precinct splits." Doc. 125-11 ¶6. The report explains in detail how the 2% deviation makes it impossible to keep many precincts and counties whole. *See* Doc. 125-11. A tight population deviation means that there will often be counties and precincts at the edges of districts that must be split so that the right amount of population gets placed into each adjoining district.[14] *See also* ALBC J.S. 38 (complaining that the 2% deviation "systemically increased the instances in which" counties were split).

Another problem with the plaintiffs' argument is that there are many good reasons to *want* to split precincts and counties. As the plaintiffs' expert explains in his report, precinct splits are often necessary to follow roads or municipal boundaries. *See* Doc. 125-11. The plaintiffs' expert explained that "[m]any precincts in Alabama split municipal boundaries, so if precinct splits are minimized[,] . . . it is difficult to avoid numerous municipal splits regardless of the deviation range." Doc. 125-11 ¶16 n.4. And, of course, the drafters had to *preserve* previous precinct and county splits to keep the new districts

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[14] For example, under a 2% deviation, a 5,000 person precinct cannot be added to a House district that already has 43,000 people. That would put the district over the limit. But the precinct also cannot be left out of the district entirely, because that would keep the district under the population deviation. Instead, the precinct must be split.

in the same locations as the old ones. The district court explained that "the districts adopted in 2001 had a similar number of precinct splits as the [new] Acts." J.S. App. 89.

A third problem with the plaintiffs' reliance on precinct splits to show a racial motivation is that the plaintiffs have never identified any specific precinct that they allege was split because of race. There was no "testimony at trial that majority-black districts incurred more precinct splits." J.S. App. 155. The only trial exhibit on precinct splitting "shows high concentrations of precinct splitting in 26 counties composed exclusively of majority-white House and Senate districts." J.S. App. 155. The exhibit also shows that "the Legislature split zero precincts" in many majority-black areas. J.S. App. 155. In other words, the only evidence on this point is that "precinct splits occurred throughout the State" for a variety of reasons. J.S. App. 155. Even though the plaintiffs produced an exhibit that identifies every precinct split, they have never pointed to one and said, "this precinct was split because of race."

Similarly, the plaintiffs failed to show, or even allege, that any particular counties were split because of race. The only county split that the plaintiffs discuss in their briefing as purportedly being racially motivated is the expansion of HD 69 into Montgomery County.[15] *See* ALBC Br. 44. But the political consultant testified that he expanded HD 69 in Mont-

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[15] The plaintiffs say that two county splits resulted from what they say was the racially motivated decision to move HD 53, but they do not say that the drafters intentionally split the county because of race. *See* ALBC Br.45 & n.80.

gomery because he needed population—not black population, just *population*—to bring that underpopulated district up to deviation. *See* APX 75 at 94:11-17. The maps support this testimony. HD 69 took up all of Wilcox and Lowndes counties and part of Autauga County in the old plan. It is almost exactly the same in the current plan, *except* that it expanded into Montgomery County to pick up additional population. *Compare* J.A. 193 *with* J.A. 194.

We concede that the political consultant who drew the maps testified that he *may* have split *some* precincts and counties *somewhere* on the basis of race. There are 36 majority-black districts between these two plans, some of which are barely majority black. This testimony—that some precincts and counties somewhere may have been split because of race—is not evidence that race "predominated" with respect to the plans "over all."

E. DOJ rejected the plaintiffs' statewide arguments when it precleared the plans.

The district court also reasoned that DOJ preclearance undermined the plaintiffs' statewide gerrymandering claims. *See* J.S. App. 162-63, 183. DOJ's regulations say that, in making the preclearance determination, it expressly considered whether "minorities are over concentrated in one or more districts" and whether "the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial

boundaries." 28 C.F.R. § 51.59(a)(4) & (6). This inquiry gave "particular attention . . . to[] the requirements of the 14th, 15th, and 24th Amendments to the Constitution." 28 C.F.R. § 51.55(a). The plaintiffs made the same arguments about statewide "packing" to *DOJ*, and DOJ necessarily rejected those arguments when it precleared these plans. J.S. App. 162-63.

To be clear, we agree with the United States that DOJ did not determine that *no* district was racially gerrymandered. *See* U.S. Br. 7 n.1. That would take the kind of district-by-district analysis that the United States proposes in its brief. But the fact that DOJ precleared these plans is good evidence that—on a statewide basis—"minorities are [not] over concentrated" in the majority-black districts. DOJ preclearance suggests that the racial percentages in the majority-black districts are mostly explained by race-neutral districting criteria.

F. The plaintiffs did not establish that race predominated as to any of the four Senate districts the ADC challenged in the district court.

In addition to finding that race did not predominant "over all," the district court evaluated the four specific Senate districts that it believed the ADC had challenged and found that those districts were also not predominantly motivated by racial purposes. *See* J.S. App. 39-40, 61-62, 70-74, 79-81, 140, 166-173. These districts are SD 7, SD 11, SD 22, and SD 26. Only one of these districts, SD 26, is a majority-black district.

The plaintiffs do not contest the district court's reasoning about these districts, they do not make district-specific claims about these districts, and they have not attempted to prove their standing to bring *Shaw* claims with respect to these districts. Nonetheless, they do mention these four Senate districts as part of their statewide challenges to the Senate plan, so we address them here.

1. SD 7 and SD 11

SD 7 is in Huntsville, and SD 11 is east of Birmingham. The plaintiffs claim that SD 7 and SD 11 were purported influence districts in the old plan, even though they were represented by white Republicans. The plaintiffs suggest, without analysis, that the black population in SD 7 and SD 11 was reduced because of the drafters' "quota" or "policy" for the majority-black districts. *See* ALBC Br. 7-9; ADC Br. 18. But that contention is obviously wrong because SD 7 and SD 11 do not border any majority-black districts.

The closest majority-black districts to SD 7 and SD 11 are miles away in Birmingham. Two of those majority-black districts (SD 19 & SD 20) are 10% and 14% *below* their purported "quota." *See* ALBC Br. App. 7a. And every competing plan puts the same percentage of black persons in those Birmingham-area Senate districts—between 60% and 65%. *See supra* 36. The black population in SD 7 and SD 11 was not "siphoned out" and "moved into black-

majority districts" to meet a "quota" or "policy."[16] ADC Br. 17.

2. SD 22

SD 22 is a majority-white district located in the south of Alabama that was represented by a white Democrat. It bordered majority-black districts to the north, but it moved further south into a majority-white area. The district court found that the main reason SD 22 moved south is that it had to take population from an over-populated majority-white district (SD 32) wedged between SD 22, the Gulf of Mexico, Mobile Bay, and the State of Florida. *See* J.S. App. 170-71; J.A. 110. As the district court explained, there was literally nowhere else in Alabama for that excess population to go without crossing a body of water. J.S. App. 169-70.

The only competing plan with different racial percentages in this area is the ADC's plan, which sends a Senate district stretching across Mobile Bay. *See supra* 37; J.A. 201. All of the legislators from this area opposed extending a district across Mobile Bay, and such a district violates traditional redistricting criteria in any event. J.S. App. 170-71. Moreover, as between the two plans that did not extend a district across this large body of water, the drafters' plan for majority-white SD 22 actually has a slightly *higher* black population (21.52%) than Senator Sanders'

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[16] A much better explanation for the way SD 11 was drawn can be inferred from the fact that a co-chair of the redistricting committee, Rep. McClendon, is the present Republican nominee for the Senate seat.

Senate plan (20.43%). *See* App. 6a. There is no reason to believe that the black population in majority-white SD 22 is best explained by a "quota" or "policy" for the majority-black districts.

3. SD 26

SD 26 is a majority-black district. The drafters preserved SD 26 as a district centered on the City of Montgomery, and its neighbor SD 25 as a predominantly suburban and rural district. To accomplish this, the political consultant explained that he moved "some precincts in the city of Montgomery" into under-populated SD 26 and out of over-populated SD 25. *See* J.A. 77. He also "took some of the rural parts of Montgomery County and put those into Senate District 25" to "connect up to Crenshaw County," which had been part of former SD 30. Tr. 3.129-30. The rural areas that were moved out of SD 26 and into SD 25 contained only 12,000 people. Tr. 3.130, 176. (An ideal Senate district is 136,564 people. Tr. 2.86.)

The "precincts in the City of Montgomery" that the political consultant moved into SD 26 to repopulate it were predominantly black because of the demographics of the City of Montgomery. According to a plaintiff who was deposed in this litigation, the "west side" of Montgomery where SD 26 has always been is "about 98 percent black." *See* Doc. 125-8 at 17:20-23 (Jiles Williams Depo.). One reason SD 26 was under-populated is that this black population had been expanding into other parts of Montgomery. Another plaintiff testified that there has been "a steady growth of black population" in the rest of the

City of Montgomery over the last ten years. Tr. 2.181 (Lynn Pettway). Although the rest of Montgomery once was majority-white, it is "more blacks now than it is whites." Tr. 2.183. As the district court explained, the "slight percentage increase of the black population in District 26 does not evidence gerrymandering of black voters; instead, it evidences consistent concentrations of black population in the City of Montgomery." J.S. App. 153.

The plaintiffs say that the drafters split precincts between SD 25 and SD 26 along racial lines, but they have never identified any precinct that they allege was split because of race. Instead, this assertion is based on the off-hand remark of SD 26's incumbent legislator, which the district court did not credit.[17] For their part, the drafters testified that they repopulated SD 26 by "put[ting] some precincts back together" that had been split in 2001, Tr. 3.183 (Hinaman testimony), and split other precincts because "precinct lines don't necessarily follow roads and boundaries." Tr. 3.184.

SD 26 has been over 70% black since 1993. J.S. App. 153. The ALBC suggests that the drafters should have repopulated SD 26 with the 13,906 people in rural Crenshaw County, thereby bringing its

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[17] The district court explained that the legislator did not even know the racial composition of SD 26 under the new plan. J.S. App. 69-70. He testified that it was 71% black under the new plan, when it is actually 75% black. J.S. App. 70. Nor did he know the racial composition under the old plan. He suggested that 71% black was a "much higher" number than the district had previously been. J.A. 45. In fact, of course, the district has always been higher than 70% black and was almost 73% black in 2010. J.S. App. 153.

black population percentage down to the high 60s. ALBC Br. 49. But only someone intent on *committing* a racial gerrymander would think to add a rural county to a district centered on the urban core of the City of Montgomery. If joining Crenshaw County to SD 26 were the "obvious solution," ALBC Br. 49, then the drafters of alternative statewide plans would have used it. But the plaintiffs' plans put Crenshaw County in SD 31 instead. *See* J.A. 201 (ADC map), C 47 (Sanders map).

The ALBC also points to the shape of SD 26 as evidence of a gerrymander, comparing it to a giant sand fiddler crab. ALBC Br. 52. But the core of SD 26's shape is the west side of the City of Montgomery, and that shape was developed in 2001. J.A. 197 (comparison maps of SD 26). The part of neighboring district SD 25 that reaches into SD 26 around Interstate 85 is nearly the same in the old and new plans. J.A. 197. This part of SD 25 is different only because the drafters moved some precincts on its borders into under-populated SD 26. The "crab claws" follow roads. J.A. 197.

Moreover, the alternative plans have similar black population percentages for SD 26, despite their use of a population deviation exceeding 2%. SD 26 in the ADC plan is 68.44% black and over-populated by 2.58%. C 48 at 1, 6. SD 26 in Senator Sanders' plan is 71.28% black, despite being under-populated by 3.77%. C 47 at 1, 6. The plaintiffs have not refuted the district court's express fact-finding that SD 26's racial composition is mostly explained by the application of race-neutral districting criteria to the demographics of the area.

* * *

After full discovery and a trial, the district court reasonably concluded that the plaintiffs failed to show that the drafters elevated considerations of race over other redistricting criteria on a statewide basis or with respect to any particular district in either the House or Senate plan. If the law allows the plaintiffs to bring a statewide racial gerrymandering claim, then they have failed to prove it.

The United States and the plaintiffs criticize the district court's reasoning about the predominance of the 2% deviation, but they are missing the point. The district court's point was *not* that districts of equal population can never be gerrymandered. The district court's point was that the 2% deviation makes it hard to manipulate districts for any purpose. J.S. App. 144-45. The district court's point was that the features of the statewide plans that the plaintiffs dislike—such as precinct splits—are mostly attributable to the 2% deviation. J.S. App. 156-58. The district court's point was that the consistent difference between the plaintiffs' plans and the drafters' plans is the 2% deviation. J.S. App. 146. The district court's point was that there is no way to use a 2% deviation, comply with traditional criteria, *and* create more "white Democratic districts." J.S. App. 146. The plaintiffs know all this, which is why they expressly challenged the 2% deviation below and in their jurisdictional statements.

We do not deny that the drafters' strategy to secure preclearance may have played a role in how some of Alabama's 140 districts were shaped. Our

only point is that the plaintiffs failed to prove that it played a significant role as to all the districts or any specific district. That is why the dissenting judge below could not say "that the plaintiffs should prevail as to all the districts" or confidently identify the specific districts as to which he thought the plaintiffs should prevail. *See* J.S. App. 227. The district court was right to reject the plaintiffs' racial gerrymandering claims.

III. The ADC lacks standing to challenge the plans on the grounds that it is challenging them.

In addition to being correct on the merits, the district court was correct that the ADC lacks standing to make the arguments that it is making. This Court requires that a plaintiff demonstrate (1) he has suffered an "injury in fact" that is "concrete and particularized;" and "not 'conjectural' or 'hypothetical'"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). The ADC did not establish any of these requirements in the district court, and it has not established any on appeal either.

A. The ADC has not been injured by the "fixed BPPs policy" that it is challenging.

The Court has recognized a single kind of cognizable harm caused by good-faith, race-based redistricting: the dignitary harm to the individual of being placed in a district on the basis of race, as opposed to other factors. A plaintiff challenging a district must "demonstrate that he or she, personally, has been injured" by a racial classification. *United States v. Hays*, 515 U.S. 737, 744 (1995). Because individual dignitary harm is the only recognized injury, the claim may be brought only to the extent that a person was injured "as a direct result of having *personally* been denied equal treatment." *Id.* at 746 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

The ALBC at least attempts to make its statewide claim fit within the *Shaw* framework. The ADC does not. Instead of identifying the kind of harm recognized in *Shaw* and *Hays*, the ADC's arguments rest on the disturbing proposition that "super-concentrated" majority-black districts are inherently harmful, while "integrated" majority-white districts are inherently beneficial. *See* Lawyers Comm. Br. 21. The district court was right to reject the ADC's standing to make this kind of claim.

1. The ADC focuses on generalized harms common to all people.

The ADC has never identified an individualized harm to itself or its members as the basis for stand-

ing. Instead, the ADC has always asserted that "[o]ur case is different" because it is based on "other sorts of harm" arising from "race-based redistricting." ADC J.S. 21.

The problem is that these "other sorts of harm" are merely "generalized grievance[s] against governmental conduct of which [the ADC] does not approve." *Hays*, 515 U.S. at 745. The ADC asserts a harm arising from the purported fact that "no level of government claims decision-making responsibility" for Alabama's districts. ADC Br. 2. The ADC asserts harm from the reduction in its influence in certain districts, which affects its "mission" of advancing its political interests. ADC Br. 55. The ADC complains that the Legislature's districts are "excessively[] segregated" as compared to the "integrated" districts the ADC says it prefers. ADC Br. 3.

These are precisely the generalized harms that this Court rejected as a basis for standing in *United States v. Hays*. In *Hays*, the Court explained that there is no "personal right to a government that does not deny equal protection of the laws." 515 U.S. at 744 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489-90 n.26 (1982)). The Court held that a plaintiff who lives in an allegedly racially gerrymandered district has standing to challenge the denial of equal treatment *only* because he or she has been personally subjected to a racial classification, which inflicts special dignitary harms. *Hays*, 515 U.S. at 745. But "where a plaintiff does not live in such a district, he or she does not suffer those special harms" and, therefore, lacks standing. *Id.*

The ADC's brief repeats verbatim the arguments that the plaintiffs unsuccessfully made in *Hays*. In *Hays*, the plaintiffs argued that it was dispositive for their standing that they were challenging the plan "in its entirety" instead of any district "in isolation." *Id.* at 746. Here, the ADC argues that it is dispositive that it "challenge[s] not one district in isolation, but a statewide policy." ADC Br. 57. In *Hays*, the plaintiffs argued that they had standing to challenge districts because "the racial composition of [one district] would have been different if the legislature had drawn [a neighboring district] in another way." 515 U.S. at 745. Here, the ADC argues that it has standing because the drafters' view of Section 5 "necessarily affect[ed] other districts . . . like a domino." ADC Br. 57. This Court unanimously rejected these arguments in *Hays*, and it should reject them again now.

2. To the extent the ADC alleges specific harms to itself or its members, it has not shown that those harms are "fairly traceable" to the policy that it challenges.

As we have explained above, on this record, it is impossible to say that the drafters' preclearance strategy had a definitive effect on the plans over all. *See also* U.S. Br. at 20-21. Nonetheless, the ADC attempts to assert three kinds of harms purportedly arising from the "fixed BPPS policy." Even assuming that these are cognizable harms under *Hays*, they are not "fairly traceable" to the drafters' so-called "policy."

First, the ADC says that plaintiff Stallworth "resides in proposed HD 77," so she "has standing to challenge the application of the State's policy to her district at least." ADC Br. 52. But HD 77 was a district that the drafters *dropped* from 73.52% black to 67.04% black. *See* ALBC Br. App. 5a. The ADC has identified no reason to believe that the drafters' preclearance strategy explains why they drew HD 76 in the way that they did.

Second, the ADC says that the drafters' "policy" "result[ed] in new, confusing precinct reassignments that often require citizens in a single county to cast ballots in different precincts for State House and Senate races." ADC Br. 56. But, as we have explained above, this harm—to the extent it is not a generalized grievance shared by every voter—is not traceable to the "fixed BPPs policy" that the ADC challenges. The 2% deviation—which the ADC does not now challenge—is what caused this precinct and county splitting. That was the testimony of the plaintiffs' expert. And it is why the ADC's chairman personally asked the district court to order the Republicans to draw new plans "follow[ing] their own rules, except for this one person—this plus or minus one" percent. Tr. 2.172.

Finally, the ADC argues that it has representational standing because, contrary to the district court's finding, the ADC has members in every district. ADC Br. 58-61. There are at least two problems with this argument. The first is that the ADC never established this fact below. The ADC claims that the trial court decided the issue *sua sponte*, but the defendants challenged the ADC's standing well before trial. *See* J.A. 204, 205, 208. The briefing below in-

cluded an argument that the "Newton Plaintiffs" (which are now the ADC plaintiffs) lacked standing to challenge a legislative district because none of the individual plaintiffs lived in that district. *See* J.A. 205 (citing *Hays*, 515 U.S. 737). The defendants argued further that "the claim asserted requires the participation of the individual ADC members." J.A. 208. The defendants' position has always been that the plaintiffs must prove their standing under *Hays*.

The more important point, however, is that the ADC has never made a claim on behalf of its individual members. Instead, it has expressly disclaimed a "*Shaw* claim" that would be based on individualized harm to a member. *See* ADC Br. 55, 58. Whatever kind of claim the ADC is litigating, that claim is not a claim made on behalf of the ADC's individual members who live in the majority-black districts.

B. The purported injuries identified by the ADC are not redressible.

As explained above, there is also no remedy for the kind of statewide claim that the ADC has brought. *See supra* 27-30. The "excessively-segregated" districts that the ADC says it dislikes will not be redressed by vacating the plans.

The ADC's dispute with these plans is political, not legal. In the trial court, the ADC's chairman, Dr. Reed, testified that majority-black districts in Alabama should be at least 60% to 65% black to ensure that black voters can elect their candidate of choice. The district court expressly credited this testimony, calling Dr. Reed the "dean of Alabama redistricting."

J.S. App. 162, 165. But the ADC's brief does not mention this testimony, and instead asks the Court to adopt the contrary testimony of Dr. Allan Lichtman, a white political scientist from Bethesda, Maryland. His testimony was offered in support of the ADC's Section 2 claim that the drafters should have created even *more* majority-black districts.

This disparity—between what the ADC says it wants on appeal and what the ADC actually wants in practice—underscores why the Court decided *Hays* in the way it did. There will always be a political loser when new lines are drawn, and the Democratic Party was the political loser here. Although the ADC dislikes the Legislature's redistricting plans because they reduce the Democratic Party's influence, that generalized grievance does not create standing to sue.

IV. The plans meet rational basis and strict scrutiny.

The drafters had a strong basis in evidence for their efforts to comply with the Voting Rights Act. The plaintiffs have dropped their argument that Alabama's plans cannot be supported by Section 5 at all, and the United States persuasively explains why those arguments are wrong anyway. *See* U.S. Br. 28-33. There is no dispute that the drafters of Alabama's plans subjectively wanted to comply with federal law in good faith. There is no dispute that federal law required them to maintain at least the same number of majority-black districts under the 2012 plan as under the 2001 plan. *See, e.g.*, NAACP Br. 7-

12. There is no dispute that federal law required them to ensure that black voters could elect their candidates of choice in those districts. The only dispute is whether the drafters went about the process in the right way.

As a strategy to secure preclearance under Section 5, the drafters avoided lowering the black population in the preexisting majority-black districts. The Court has recognized that states have leeway to use race in redistricting to comply with federal law. *See* U.S. Br. 28-34. And a redistricting plan meets strict scrutiny if a state's use of race was "reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993). Although the state needs a "strong basis in evidence" to support its consideration of race, *id.* at 656, it does not have to "get things just right," *Vera*, 517 U.S. at 978 (plurality opinion).

The plaintiffs introduced almost no evidence below to show that lower percentages would preserve black voters' ability to elect in Alabama's majority-black districts. The only witness who testified that the percentages could be lower was plaintiffs' expert, Theodore Arrington. J.S. App. 90-93. But the district court made an express determination that his testimony on this point was not credible. J.S. App. 91-93. For example, his testimony here is contrary to his testimony in previous redistricting cases in Alabama, in which he testified that black-voting-age-population percentages of 61% would create toss-up districts that gave black voters only a "chance" to elect a candidate of choice. J.S. App. 91-92 (discussing *Wilson v. Jones*, 130 F. Supp. 2d 1315 (S.D. Ala. 2000)). The plaintiffs now rely on Allan Lichtman, but his testimony was specific to the three districts

he examined as part of the plaintiffs' Section 2 claim: "I'm not making any points about any other aspects of the elections. That's not what I studied. I simply studied the *Gingles* factors." Tr. 3.101-03, 107.

Alabama's drafters relied on the best evidence available to them to ensure that they did not diminish black voters' ability to elect: established caselaw, the existing districts, the Democrats' prior redistricting practices, and the suggestions of black political leaders. J.S. App. 184. Black political leaders and the caselaw suggested to the drafters that safe districts are 65% black. In this respect, it is telling that only 4 of the 13 House districts that the ALBC criticizes as being too close to the "quota" are above 65% black. ALBC Br. 30. None of the Senate districts that are criticized as being too close to the "quota" are above 65% black. *See* ALBC Br. App. 7a. The plaintiffs are wrong to attack the drafters' good-faith preclearance strategy.

A. The drafters believed that Section 5 prohibited "significant reductions" in black population.

The plans were drafted on the premise that "significant" or "sizable" reductions in black population percentages in the preexisting majority-black districts would almost certainly be retrogressive. The district court expressly found that the drafters "understood 'retrogression' under section 5 of the Voting Rights Act to mean the reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as com-

pared to the 2001 districts with the 2010 data." J.S. App. 33.

In an attempt to show that the drafters believed Section 5 to prohibit any *minimal* reduction in black percentage, the plaintiffs rely almost exclusively on the testimony of Senator Dial. But he is not an expert or a lawyer, he did not draw the lines of any particular district, and he had "very little input" into the House plan. APX 66 at 27:1-8, 28:4-14, 40:2-16; Tr. 1.55. Moreover, the plaintiffs take some of Senator Dial's testimony out of context. The plaintiffs say that Senator Dial rejected Senator Sanders' statewide plan merely because it decreased the black population percentage in some of the majority-black Senate districts. But Senator Dial said that he "can't remember" all the reasons for rejecting Senator Sanders' plan. APX 66 at 42:5. Senator Sanders' plan did not comply with the 2% deviation, and he did not propose the plan until deep into the legislative process. J.S. App. 58-59, 98-99. The plan also violated what Senator Sanders himself had told Senator Dial was necessary for the majority-black districts (i.e. at least 62% black). J.A. 177.

Randy Hinaman, the consultant who actually drew the lines, testified that he was concerned that preclearance would be denied if the black population percentage in a majority-black district was "significantly below" the old percentage. J.A. 88. This was the political consultant's testimony about his understanding of Section 5 when responding to a direct question at trial: "[I]f I was significantly below [the 2010 census percentages as applied to 2001 lines] I was concerned about that being retrogression that would be looked upon unfavorably by the Justice De-

partment under Section 5." J.A. 88. He similarly testified in his deposition that: "I thought if we had large deviations from previous percentages that that would potentially create preclearance problems with the Department of Justice." APX 75 at 24-25. He did not want a district to "go[] from 60 percent to 51 [percent] or something like that." APX 75 at 61:7-11.

B. The drafters had a strong basis in evidence to avoid reducing black population in the preexisting majority-black districts to prove that the plans had no retrogressive effect.

The drafters' strategy was a reasonable way to prove that the new plans did not have retrogressive effects. The burden under Section 5 is on *the state* to establish that a plan does not have the effect of retrogressing the position of a racial minority. *See South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). It is not a matter of defending against litigation; it is a matter of proving the *absence* of retrogression.

It is "never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960). But in 2006, Section 5 became even more burdensome because Congress amended the Voting Rights Act to prohibit any plan with the "effect of diminishing the ability" of racial minorities in a majority-minority district to "elect their preferred candidates of choice." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577 (2006). To prove that the plans did not "diminish the ability of" black

voters to elect their "candidates of choice," the drafters reasonably sought, where possible, not to decrease the black population in the preexisting black districts.

1. The drafters' preclearance strategy was reasonable.

The drafters focused on the black population percentages in the districts because DOJ's guidelines told them to. Those guidelines state that a "comparison of the census population of districts in the benchmark and proposed plans" is "the important starting point of any Section 5 analysis." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). Indeed, when a state submits a plan for preclearance, the DOJ's regulations require it to provide *only* population data and maps. *See* 28 C.F.R. §§51.27(q); 51.28(a)(1) & (b)(1). DOJ's guidelines say that it will use that data as "the important starting point" to determine "whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race...." 28 C.F.R. § 51.52(a).

This is consistent with Section 5 caselaw, which holds that a deeper inquiry into a minority's ability to elect is unnecessary if population statistics alone reflect that ability. "Placing black voters in a district in which they constitute a sizable and therefore 'safe' majority ensures that they are able to elect their candidates of choice." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Therefore, under Section 5, if a racial minority "constitutes a supermajority in a dis-

trict," there is "no need to make further inquiries into minority voters' ability to elect." *Texas*, 831 F. Supp. 2d at 263. The Court's retrogression analysis in *Beer* consisted, entirely, of a "straightforward" comparison of the racial characteristics of the old and new districts. *Beer v. United States*, 425 U.S. 130, 142 (1976). *See also Vera*, 517 U.S. at 983 (Section 5 could "justify maintenance . . . of the African-American population in District 18"); *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977) ("[T]he percentage of eligible voters by districts is of great importance to [Section 5] inquiry.").

We agree with the plaintiffs that it is *theoretically possible* for a plan to reduce a majority-black district's population and still be precleared. *See also* NAACP Br. 12. The plans here, for example, reduced the black population in a number of districts. But the counterpoint is also true: avoiding a reduction in a majority-black district is *one way* that a state can meet *its* burden to establish non-retrogression.[18] The state had to generate evidence to prove the negative proposition that its plans were not retrogressive. By avoiding a reduction of black population in preexisting majority-black districts, the state generated that evidence, foreclosing a battle of experts about black voting patterns, registration rates, and other factors.

In fact, as the district court points out, this process is how the plaintiffs themselves redistricted when they were in power. J.S. App. 161-62. Dr. Reed,

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[18] The only time DOJ has apparently denied preclearance to a plan that kept the minority population stable was in a plan that replaced one group of Hispanics with another group of Hispanics that was less likely to vote.

the ADC's chairman, testified that his foremost goal in the previous round of redistricting was: "We're not going to lower the black districts." Tr. 2.165. The ALBC's brief notes that the Democrats in 2001 did not repopulate the majority-black districts to the level of the most recent election. *See* ALBC Br. App. 8a. Instead, they repopulated the majority-black districts to the same level *as they had been in 1993*. J.S. App. 21, 46. The ALBC does not explain how the difference in determining the purported "quota" justifies the Democrats' use of a "quota" but not the Republicans'.

Alabama's legislators were also not alone in preserving the population of existing majority-minority districts as a strategy to comply with Section 5 after the 2006 reauthorization. Although critical of the practice, one law professor reports that redistricters in California, Florida, North Carolina, South Carolina, Texas, and Virginia intentionally sought to preserve minority population percentages in majority-minority districts during the most recent redistricting cycle. *See* Justin Levitt, *Color by Numbers: The New Misreading of the Voting Rights Act*, 21-29 (Aug. 23, 2014) (unpublished manuscript).[19]

The plaintiffs argue that, instead of the simple task of avoiding drops in black population, the drafters should have performed a district-by-district "functional analysis." But the drafters had no reason to turn the question of compliance into a "Monday-morning 'battle of the experts.'" *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987). "[D]eference is

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[19] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487426 (last visited Oct. 6, 2014).

due to [states'] reasonable fears of, and to their reasonable efforts to avoid . . . liability." *Vera*, 517 U.S. at 978. The "strong basis in evidence" standard gives the states leeway in considering race to avoid liability under the Voting Rights Act. *See Ricci v. DeStefano*, 557 U.S. 557, 582-583 (2009); *LULAC*, 548 U.S. at 520 (Scalia, J., dissenting and concurring) ("[A] State is permitted great flexibility in deciding how to comply" with the Voting Rights Act.). The drafters' strategy was within that leeway.

2. The drafters' strategy is consistent with Section 5's 2006 text.

The drafters' strategy is also consistent with the text of the 2006 reauthorization. In *Georgia v. Ashcroft*, the Court held that a court under Section 5 "should not focus solely on the comparative ability of a minority group to elect a candidate of choice . . . [because this factor] cannot be dispositive or exclusive." 539 U.S. at 480. Congress disagreed with *Georgia v. Ashcroft* and expressly reversed it. It made the "comparative ability of a minority group to elect a candidate of choice" the "dispositive or exclusive" factor.

To overturn *Georgia v. Ashcroft*, Congress added subsections (b) and (d) to Section 5 to prohibit "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice." Voting Rights Act § 5, 42

U.S.C. § 1973c.[20] The relevant question for judging retrogressive effect is now whether minorities' preferred candidate "under the benchmark plan is *equally likely* to win under the new plan." Nathaniel Persily, *The Promise & Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 223 (2007) (emphasis added). "If not, then minorities' ability to elect their preferred candidate is diminished." *Id.*

This "ability to elect" standard is a comparative inquiry that recognizes that districts move along a continuum in their "ability to elect." "[T]he ability to elect preferred candidates, like the ability to play the violin, is a matter of degree, not a difference in kind." Persily, *supra*, at 243. Therefore, "[d]iminishing a district's ability to elect does not necessarily mean reducing it from a safe district to a hopeless district;" it could also "mean reducing a safe district to a competitive district." *Id.* As the district court explained, a plan that "substantially reduce[s] the percentages of black voters within the majority-black districts" will necessarily "diminish black voters' ability to elect their preferred candidates," even if it does not result in black voters having *no* chance to elect a candidate of choice. J.S. App. 181.

This is especially true with respect to the preexisting districts in Alabama. None of these districts was 99% black. They were all in the 50s, 60s, and 70s. And black voting-age population is two or three points less than total black population, such that a 60% black district actually has a 57% black voting-

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[20] Section 5 has recently been reclassified at 52 U.S.C. § 10304. We use the old citations so that our citations match the district court's and appellants'.

age-population. Reducing a district from 65% black voting-age population to 55% black voting-age-population will obviously "diminish" black voters' "ability to elect a candidate of choice" by making the district more competitive. In fact, the plaintiffs' expert testified that black voters in these kinds of districts would have only a "fighting chance" or "reasonable opportunity" to elect a candidate of choice. Tr. 3.51-52, 58.

3. The drafters' strategy is consistent with the 2006 legislative history.

The drafters' strategy to comply with Section 5 also finds support in the legislative history of the 2006 reauthorization. Congress was well aware that its 2006 changes would lead redistricters to preserve existing black populations in existing majority-minority districts.

First, by overturning *Georgia v. Ashcroft*, Congress effectively approved of the district court opinion that this Court had reversed. That district court had held, "[i]n large part, the retrogression inquiry looks to the plan's effect on minority voting strength by considering the number of potential African American voters in the existing and proposed districts." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 78 (D.D.C. 2002). The court noted that "there is a correlation between a district's [black voting age population] and the likelihood that a candidate of choice will be elected in that district" and highlighted the fact that "reductions of over 10% are present" in Georgia's plan. *Id.* at 80, 82. Even though Georgia produced an expert to opine that black voters would

still have an excellent chance to elect their candidate of choice in the new districts, the district court held that Georgia had not met its burden and denied preclearance. The district court expressly reasoned that Section 5 was a "one-way ratchet." *Id.* at 98 (Edwards, J., concurring). *Compare* J.S. App. 263 (dissenting opinion) (arguing that Section 5 is *not* a "one-way ratchet").

Only one witness testified against overruling *Georgia v. Ashcroft* in the Senate, warning the Judiciary Committee that "overrul[ing]" it would be "a mistake." That witness was the ADC's counsel, Professor Richard Pildes. *See The Continuing Need for Preclearance: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 2d Sess. at 11 (2006) (statement of Richard H. Pildes).[21] When asked why he did not want Congress to impose a "diminished ability to elect" standard, Prof. Pildes responded with the same policy arguments that the ADC makes in its brief. He told Congress that a "no 'diminished ability to elect'" standard "has a rigidity and a mechanical quality that can lock into place minority districts in the south at [high black] populations that do not serve minority interests." *Id.* at 12. *See, e.g.*, ADC Br. 37 (criticizing Alabama's compliance efforts as "too rigid and mechanical"). He suggested, as an example, that "dropping the minority population" of a district "from 60 percent to 55 percent" could violate the standard. *Id.* Congress adopted the "diminished ability to elect" standard anyway.

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[21] Available at http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf (last visited Oct. 8, 2014).

Second, when overruling *Ashcroft*, Congress expressly approved of state districting plans that intentionally preserved black population in majority-black districts. The House report noted approvingly that, when Georgia redrew its congressional districts after a court overturned them in 2005, "[t]he plan it drew maintained the black voting age population in the two majority black districts . . . at almost exactly their preexisting levels, and it did the same for the other two districts . . . that had elected black Members of Congress." H.R. Rep. No. 109-478, at 24 (2006), *reprinted in* 2006 U.S.C.C.A.N 618. The ACLU's report to Congress also lauded Georgia's 2005 plan, explaining that the plan complied with Section 5 because "[t]he black percentages in the majority black districts . . . were kept at almost exactly the same levels as under the plan that had been passed by the Democratic controlled legislature in 2002." *See* Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, ACLU Voting Rights Project at 136 (Mar. 2006).[22]

On the other hand, when the House Committee surveyed recent practices that it said supported the reauthorization of Section 5, it highlighted redistricting plans that had reduced black population in majority-black districts. Among those practices was a Virginia county's decision to "reduce[] the African American population" in a particular district. H.R. Rep. No. 109-478, at 38. The Committee noted that

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[22] Available at https://www.aclu.org/files/pdfs/votingrights report20060307.pdf (last visited Sept. 12, 2014).

DOJ objected because "even a minute reduction would have greatly impaired African American voters' ability to elect candidates of choice." *Id.*

C. The drafters had a strong basis in evidence to avoid reducing black populations to prove that the plans did not have a "discriminatory purpose."

Under the new Section 5, the state also had the burden to prove that the plans were *not* motivated by a discriminatory purpose, as broadly defined. In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Court held that Section 5 does not prohibit changes that, although motivated by a discriminatory purpose, are non-retrogressive. Congress explicitly reversed *Bossier Parish* in 2006, amending Section 5 to provide that a forbidden purpose is "any discriminatory purpose," not merely a retrogressive purpose. 42 U.S.C. § 1973c(c). Because it is the state's burden to overcome Section 5, this provision effectively created a presumption that the plans were discriminatory.

To disprove the presumption that their plans were motivated by a discriminatory purpose, the drafters based their majority-black districts on the preexisting districts that black legislators had drawn when their party was in power. They also incorporated the views and suggestions of black legislators for their own districts. J.S. App. 184. Most of those legislators told the drafters to maintain the black population in the majority-black districts at between 60% and 65%, and they proposed changes to their own districts that accomplished that goal. J.A. 51,

177, 178. This focus is consistent with voting-rights caselaw from Alabama. As we have already noted, one of the plaintiffs' experts testified in a previous Section 2 case that a 61% black district would be a district in which black voters only *might* be able to elect their candidate of choice. J.S. App. 91-92. The drafters had no reason to ignore this advice and caselaw. As Senator Dial testified, "if [he] had told" black political leaders that he knew what was best for black people in Alabama, they would have "asked [him] when [he] was going to the mental institute." Tr. 1.44-45.[23]

Imagine the strength of the purposeful discrimination argument if the Republican drafters had: (1) ignored the suggestions of black legislators for their own districts, but incorporated the suggestions of white legislators for their districts, (2) reduced the black populations in majority-black districts by flooding them with white voters who tend to vote Republican, (3) created scores of districts that were less than the 60% to 65% threshold that black political leaders referenced and caselaw supported, and (4) acted in a substantially different manner than the Democrats had when they redistricted in 2001. It would have been very difficult for the state to bear *its* burden to establish that those plans did *not* have a discrimina-

---

[23] This kind of thing has not gone over well in other states. In North Carolina, for example, a "white ACLU attorney" criticized a black legislator's approach to redistricting, and he responded, "I've been black all my life, I've fought for black causes, and I don't need some white woman from Atlanta telling me what to do." Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*, 123-24 (Praeger Publishers 2001).

tory purpose. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977).

D. The state should have the discretion not to perform a subjective and expensive "functional analysis" for every majority-minority district.

Finally, the ADC's view—that legislators *must* perform a functional analysis for each majority-black district as part of the redistricting process—raises serious practical and constitutional problems. It is also inconsistent with the principle of allowing legislators discretion to comply with Section 5.

First, requiring state legislators to perform a race-focused functional analysis for each and every majority-black district greatly exacerbates the federalism costs of Section 5. Allowing states to compare, based on current census data, the number and population of majority-minority districts in the benchmark plan and proposed plan simplifies the process. It is an objective standard to judge retrogression that legislators can easily apply.

Second, requiring a "functional analysis" for all districts would inject racial stereotyping into redistricting in unwarranted ways. A functional analysis requires, at its first step, the identification of minority voters' purported "candidate of choice." Then the question is how many minority voters must be in a district to elect that "candidate of choice." This process, as described by the plaintiffs, "encourages a racially based understanding of the representative function," under which "geographic districts are

merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race." *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring).

This is also a highly subjective way of complying with Section 5. For example, the plaintiffs' expert, Allan Lichtman, opined that the white incumbent in HD 73 was black voters' candidate of choice, and the ADC's brief repeats this assertion. *See* ADC Br. 33. But the ADC's chairman apparently disagreed. He testified that this incumbent legislator would not win an election if his district were majority black, instead of plurality black. The chairman explained that, in the ADC's proposed plan, he intentionally reduced the black population in HD 73 so that the white Democrat could continue to be elected. *See* J.A. 53. The ADC's chairman believed that, if there were "too many" black voters in the district, "some black would run against [the incumbent white Democrat], and we can't stop it." *See id.*

The way to avoid this stereotyping and subjectivity is by allowing states the leeway to comply with Section 5 based primarily on population statistics. If enough black voters are in a district, then we can be confident that the candidate of choice supported by black voters will win. There is no need for the state to identify black voters' "candidate of choice" so that it can then determine how many black voters must be in a district to elect *that* candidate. The voters in a district will tell the state who they want to represent them, not the other way around.

* * *

Alabama's new legislative leaders sought to comply with federal voting laws that their forebears would have resisted. They did not gerrymander "white Democratic districts" to undermine their own political party. But they balanced competing interests and preserved the status quo. They did not maximize black political influence, but they ensured that black voters would be represented in the Legislature in proportion to their share of the population. The plans they adopted may not be perfect, but they are constitutional.

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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October 9, 2014

APPENDIX

Comparison of black population percentages between the competing plans in all House Districts 1a

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Comparison of black population percentages between the competing plans in all House Districts

This table compares the black population percentages for all districts in the House plan as passed, DX 403 at 1-8, the McClammy plan, C45 at 6-13, the ADC plan drafted by Dr. Reed, C42 at 6-13, and the Knight plan drafted by Mr. Cooper, C46 at 6-13.

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
1	14.90%	17.63%	17.63%	17.60%
2	3.97%	1.98%	2.06%	2.48%
3	23.74%	18.53%	18.62%	23.62%
4	12.75%	8.77%	11.44%	15.14%
5	12.42%	10.23%	9.73%	9.44%
6	16.58%	30.60%	26.45%	27.59%
7	3.85%	16.70%	11.19%	2.34%
8	20.00%	25.62%	24.46%	24.74%
9	1.89%	2.55%	11.86%	6.24%
10	16.18%	13.41%	14.11%	5.56%
11	0.58%	0.39%	0.47%	0.61%
12	1.47%	1.51%	1.47%	1.68%
13	6.27%	6.35%	1.45%	5.65%
14	2.64%	2.98%	7.11%	12.20%
15	13.78%	10.31%	9.38%	10.13%
16	10.38%	10.08%	9.00%	7.52%
17	4.18%	3.38%	2.76%	6.24%
18	5.38%	4.39%	4.39%	4.27%
19	61.25%	67.07%	67.01%	75.39%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
20	3.84%	3.67%	3.12%	10.88%
21	8.51%	26.87%	29.64%	20.06%
22	5.74%	6.89%	6.30%	16.96%
23	3.80%	3.73%	3.72%	3.51%
24	1.50%	1.50%	1.46%	1.00%
25	15.99%	19.05%	15.60%	22.71%
26	1.55%	1.44%	1.52%	1.57%
27	1.51%	1.70%	1.65%	0.91%
28	29.35%	16.49%	17.52%	29.04%
29	3.50%	16.92%	16.31%	2.12%
30	4.37%	3.88%	5.93%	3.97%
31	15.85%	20.96%	21.06%	8.75%
32	60.05%	58.40%	56.68%	21.65%
33	21.22%	22.34%	21.30%	19.27%
34	1.73%	1.57%	1.86%	0.73%
35	16.08%	13.48%	14.98%	36.43%
36	12.19%	12.44%	10.46%	10.42%
37	29.31%	23.74%	20.85%	19.67%
38	17.93%	18.31%	29.41%	16.31%
39	5.23%	4.26%	4.24%	12.33%
40	13.25%	11.79%	13.46%	38.94%
41	11.97%	14.08%	16.04%	10.09%
42	10.97%	10.08%	11.93%	9.69%
43	6.64%	6.55%	8.09%	8.52%
44	11.48%	19.96%	27.02%	9.69%
45	15.18%	9.49%	7.86%	13.37%
46	7.53%	6.09%	6.94%	21.97%
47	20.13%	16.96%	16.48%	6.78%
48	5.65%	10.05%	9.93%	10.46%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
49	12.92%	13.30%	11.33%	62.65%
50	8.41%	8.57%	9.09%	5.77%
51	5.88%	14.09%	7.83%	7.32%
52	60.13%	62.27%	61.34%	54.07%
53	55.83%	62.00%	56.61%	55.86%
54	56.83%	31.46%	31.40%	58.72%
55	73.55%	62.92%	66.66%	64.03%
56	62.14%	61.06%	58.16%	54.02%
57	68.47%	62.27%	61.89%	60.27%
58	72.76%	66.20%	76.98%	61.09%
59	76.72%	66.62%	64.85%	61.27%
60	67.68%	62.26%	65.38%	59.55%
61	18.89%	25.02%	18.43%	14.41%
62	15.50%	15.12%	16.53%	17.99%
63	13.41%	24.15%	20.47%	22.08%
64	14.22%	12.76%	34.38%	31.91%
65	23.98%	29.45%	26.59%	14.81%
66	25.16%	28.20%	6.00%	2.54%
67	69.15%	69.21%	68.63%	69.43%
68	64.56%	53.87%	55.19%	25.43%
69	64.21%	57.56%	56.92%	57.62%
70	62.03%	61.18%	61.66%	57.21%
71	66.90%	60.42%	59.43%	54.45%
72	64.60%	60.37%	55.37%	56.25%
73	10.23%	22.54%	38.20%	83.58%
74	24.52%	27.36%	39.83%	26.18%
75	26.43%	30.03%	21.78%	20.14%
76	73.79%	75.62%	64.36%	24.45%
77	67.04%	67.34%	62.31%	59.38%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
78	69.99%	73.03%	74.21%	58.70%
79	11.62%	14.12%	13.55%	32.55%
80	17.19%	17.32%	17.51%	15.08%
81	19.86%	28.96%	25.39%	5.60%
82	62.14%	61.14%	57.22%	53.63%
83	57.52%	61.87%	55.99%	13.30%
84	52.35%	51.40%	52.00%	26.29%
85	50.08%	47.96%	53.94%	54.21%
86	13.46%	16.11%	14.59%	40.50%
87	8.86%	8.45%	8.82%	25.83%
88	18.23%	14.11%	16.70%	71.97%
89	32.00%	30.47%	30.25%	17.38%
90	34.65%	29.39%	39.63%	56.29%
91	15.73%	15.59%	18.03%	18.05%
92	12.64%	14.54%	13.15%	10.79%
93	17.11%	19.07%	13.81%	8.17%
94	8.21%	8.35%	8.87%	10.76%
95	4.94%	4.87%	4.86%	6.84%
96	10.23%	11.37%	11.22%	5.26%
97	60.66%	63.00%	63.59%	57.19%
98	60.02%	60.22%	61.57%	63.75%
99	65.61%	62.92%	63.55%	57.98%
100	14.98%	14.12%	10.31%	18.89%
101	17.02%	20.83%	22.65%	62.45%
102	7.90%	8.80%	8.12%	10.67%
103	65.06%	62.08%	63.03%	17.92%
104	15.79%	13.42%	13.30%	12.33%
105	9.06%	10.18%	10.30%	13.49%

Comparison of black population percentages between the competing plans in all Senate Districts

This table compares the black population percentages for all districts in the Senate plan as passed, DX 400 at 1-3, the Sanders plan drafted by Mr. Cooper, C47 at 4-6, and the ADC plan drafted by Dr. Reed, C48 at 4-6.

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
1	10.98%	10.55%	12.75%
2	24.40%	19.69%	13.86%
3	13.68%	11.11%	10.90%
4	1.74%	1.17%	1.43%
5	6.41%	9.51%	3.41%
6	15.04%	11.09%	7.05%
7	27.34%	41.26%	47.17%
8	3.28%	2.56%	2.90%
9	1.52%	5.91%	4.61%
10	12.27%	6.07%	13.04%
11	14.96%	26.67%	33.76%
12	20.10%	11.29%	11.99%
13	20.64%	27.79%	26.65%
14	14.08%	14.81%	11.71%
15	14.49%	11.53%	8.24%
16	11.83%	12.48%	11.81%
17	5.36%	6.66%	7.31%
18	59.10%	58.49%	61.32%
19	65.31%	65.30%	62.89%
20	63.15%	62.82%	65.10%

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
21	15.50%	17.29%	16.96%
22	21.52%	20.43%	29.66%
23	64.84%	57.75%	61.23%
24	63.22%	56.90%	60.43%
25	22.82%	34.06%	28.89%
26	75.13%	71.28%	68.44%
27	21.15%	22.75%	20.16%
28	59.83%	51.55%	60.38%
29	15.01%	18.77%	13.24%
30	21.95%	18.63%	14.90%
31	19.40%	23.63%	19.83%
32	7.84%	7.74%	7.81%
33	71.64%	71.83%	65.83%
34	12.69%	14.17%	11.34%
35	19.11%	18.87%	25.12%

Population by county in Alabama from APX 19.

County	Total Population	% Black Population
Macon	21,452	83.5%
Greene	9,045	81.8%
Sumter	13,763	75.2%
Lowndes	11,299	73.9%
Wilcox	11,670	72.8%
Bullock	10,914	70.6%
Dallas	43,820	70.0%
Perry	10,591	69.0%
Hale	15,760	59.2%
Montgomery	229,363	55.4%
Marengo	21,027	52.2%
Barbour	27,457	47.4%
Conecuh	13,228	47.0%
Clarke	25,833	44.3%
Butler	20,947	43.8%
Choctaw	13,859	43.7%
Russell	52,947	42.8%
Jefferson	658,466	42.5%
Monroe	23,068	42.4%
Pickens	19,746	42.2%
Chambers	34,215	39.4%
Pike	32,899	37.4%
Mobile	412,992	35.3%
Escambia	38,319	32.5%
Talladega	82,291	32.3%

County	Total Population	% Black Population
Coosa	11,539	31.4%
Tuscaloosa	194,656	30.1%
Henry	17,302	29.1%
Tallapoosa	41,616	27.1%
Houston	101,547	26.6%
Washington	17,581	25.3%
Madison	334,811	25.1%
Crenshaw	13,906	24.1%
Lee	140,247	23.4%
Bibb	22,915	22.4%
Calhoun	118,572	21.4%
Elmore	79,303	20.6%
Randolph	22,913	20.6%
Dale	50,251	20.6%
Autauga	54,571	18.3%
Coffee	49,948	17.6%
Colbert	54,428	16.8%
Etowah	104,430	15.8%
Clay	13,932	15.6%
Limestone	82,782	13.3%
Covington	37,765	13.1%
Morgan	119,490	12.6%
Lawrence	34,339	12.0%
Fayette	17,241	11.9%
Lamar	14,564	11.9%
Shelby	195,085	11.1%
Lauderdale	92,709	10.7%
Chilton	43,643	10.2%

County	Total Population	% Black Population
Geneva	26,790	10.1%
Baldwin	182,265	9.9%
St. Clair	83,593	9.0%
Walker	67,023	6.4%
Cherokee	25,989	5.1%
Franklin	31,704	4.4%
Marion	30,776	4.2%
Jackson	53,227	3.9%
Cleburne	14,972	3.7%
Marshall	93,019	2.1%
DeKalb	71,109	1.8%
Blount	57,322	1.6%
Cullman	80,406	1.3%
Winston	24,484	0.7%

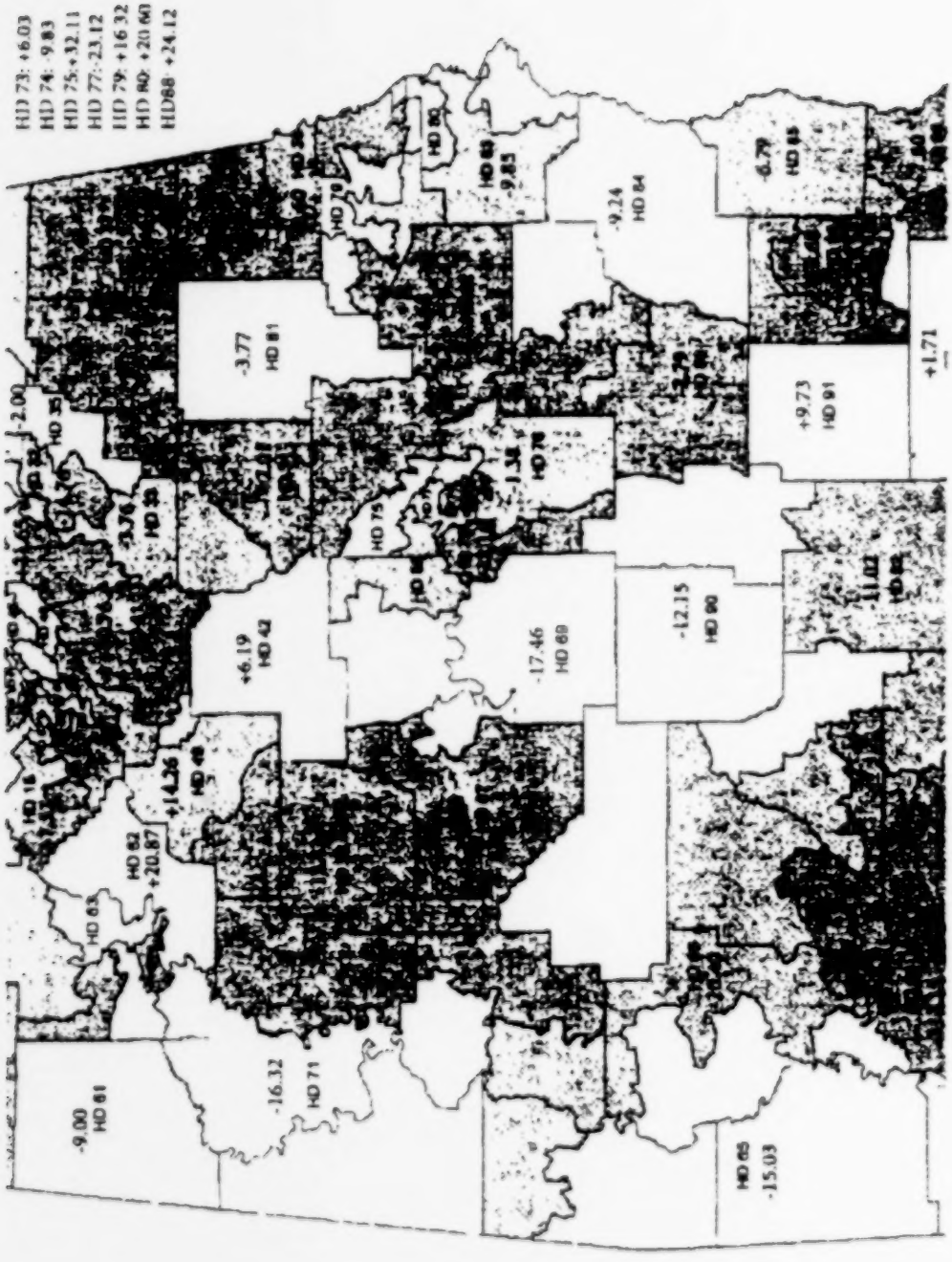
Population of various cities/towns in Alabama's majority-black districts from Census.gov.

To view this information online, select "Advanced Search" at the top of the American FactFinder page of the Census.gov website (http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml). Enter table name "DP-1:Profile of General Population and Housing Characteristics:2010" and click "Go." Then select the "Geographies" filter on the left side of the page and select "Place—160" in the dropdown box. In the next dropdown box, select "Alabama" and then "All Places within Alabama." Next click "Add to your Selections." When these words appear in the "Your Selections" box, close the dialog box. Select the "2010 Demographic Profile SF" dataset. From the resulting page, either download the entire data set for all Alabama cities or select the desired city from the dropdown box labeled "Geography."

City/Town	Total Population	% Black Population
Bessemer	27,456	71.2%
Birmingham	212,237	73.4%
Center Point	16,921	62.9%
Clayton	3,008	63.8%
Eutaw	2,934	80.2%
Evergreen	3,944	62.4%
Fairfield	11,117	94.6%
Forestdale (CDP)	10,162	71.4%
La Fayette	3,003	68.8%
Lanett	6,468	57.5%

City/Town	Total Population	% Black Population
Livingston	3,485	63.9%
Marion	3,686	64.1%
Midfield	5,365	81.6%
Mobile	195,111	50.6%
Monroeville	6,519	55.7%
Montgomery	205,764	56.6%
Prichard	22,659	85.8%
Selma	20,756	80.3%
Selmont-West Selmont (CDP)	2,671	93.9%
Tuskegee	9,865	95.8%
Union Springs	3,980	71.8%
York	2,538	85.6%

12a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HD 80: +20.60
HD88: +24.12
-3.77
HD 81
-9.24
HD 84
+9.73
HD 91
+1.71
+6.19
HD 42
-17.46
HD 69
-12.15
HD 90
-9.00
HD 61
-16.32
HD 71
HD 65
-15.03
HD 62
+20.87
HD 63
HD 75
HD 80
HD 79
HD 85
-2.00

REPLY BRIEF

No. 13-895

In The
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

v.

ALABAMA, *et al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

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I. ALBC PROPERLY CHALLENGED ALL 36 MAJORITY-BLACK DISTRICTS

(1) This action contends that *all* of the majority-black Alabama legislative districts were drawn for an overriding racial purpose.[1] The plaintiffs assert that this same predominant racial purpose drove the fashioning of the boundaries of every one of the 28 majority-black House districts and 8 majority-black Senate districts. The state argues that this lawsuit is thus only a challenge to the districting plan "in its entirety," and not a challenge to any "particular district." That distinction makes no sense. A constitutional challenge to all 36 districts is not different from 36 challenges to individual districts; "the plan" and "all 36 districts" are not entities distinct from the 36 districts themselves, in the way that the United States is a different entity than the 50 states.

The testimony of the drafters relied on by plaintiffs described the purpose which they sought above all to achieve in drawing the lines of "the minority districts." ALBC Br. 22-25. Clearly their testimony referred to the purpose of the district lines of all of those majority-black House and Senate districts, not instead to a distinct purpose of the "plan." See J.S.App. 144 (Legislature maintained "the proportion of black persons in each majority-black district"), 189 (drafters sought to "adopt for each majority-black

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[1] "I understand the Caucus to challenge each individual majority-black district...." J.S.App. 209 n.21 (dissenting opinion).

district a particular percentage of black population") (dissenting opinion). Surely plaintiffs were not required, instead of simply asking the drafters a single question about the purpose of the minority "districts," to instead ask the same question 36 times about each particular majority-black district. Hinaman explained that matching the prior racial composition of the existing black district was the purpose and methodology for redrawing any "individual district," ALBC Br. 22, and the state itself characterized this racial goal as pertaining to "each black-majority district." *Id.* at 23. In this Court, the state insists, as it did at trial, that the "strategy to secure preclearance ... [of] the drafters [was to] avoid[] lowering the black population in the preexisting majority-black districts." Br.Appellees 70. That strategy was applicable to every one of those districts, because the state wanted all of them to be precleared.

In addition to evidence regarding the general standard applied in drawing all the majority-black districts, the plaintiffs offered evidence about specific instances in which that racial standard had shaped the boundaries of a number of particular districts; indeed, the documentary record and testimony were replete with references to particular districts. For example, plaintiffs demonstrated that HD 53 was cannibalized to meet that racial standard, an action which was intended to and did determine the shape of

the 8 remaining black districts in Jefferson County.[2] This evidence was not offered to establish a different claim – about specific districts – but to buttress the evidence that race was an overriding purpose of all the districts. The ALBC post-trial brief asserted that "it was the need to maximize the size of black majorities that drove nearly every districting decision." Doc. 194, ¶ 115. The ADC post-trial brief cited numerous examples of particular majority-black districts drawn on the basis of race.[3]

It is not at all clear what the state means when it asserts the plaintiffs were only challenging the plans in their "entirety." The *Shaw* claims obviously did not challenge the 77 majority-white House districts or the 27 majority-white Senate districts. The plaintiffs clearly were not advancing an all-or-nothing argument, insisting that the court was limited to invalidating either every one or none of the majority-black districts. At times the state appears to suggest that *only* "district-specific evidence" could be considered in a *Shaw* case (Br.Appellees 32), as if direct evidence applicable to many districts is inadmissible. But that surely is not the law. The remedial issues posed by a

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[2] The trial testimony, depositions, and documentary evidence are pervaded with information about particular districts.

[3] Doc. 195-1. Those proposed findings were not, as the state argues, limited to ADC's Section 2 and county-splitting claims. Br.Appellees 14. The 90 pages of proposed factual findings are not tied to any particular claim; the brief deals with those distinct claims only in its Conclusions of Law. Doc. 195-1, pp. 91-103 (Section 2 claim), 103-11 (*Shaw* claim).

Shaw challenge to 36 districts are no different from the issues posed by a challenge to a single district; a court would declare unconstitutional the district or districts in question, and order the state to adopt district lines that do not violate *Shaw*.

The state objects that courts would find it impossible to conduct a strict scrutiny analysis of a race-based practice that had been applied to multiple districts, insisting that such an analysis could only be made on a district-specific basis. Br.Appellees 16, 24-25. But the state then sets out on pages 71-84 of its brief an intelligible, although incorrect, strict scrutiny defense of its statewide "strategy," a defense which never mentions a single specific district. And at the end of its brief the state objects to ADC's contention that a defendant must offer separate district-specific justifications for a practice used in multiple districts. "The court should not require legislators to conduct a 'functional analysis' for every majority-black district." Br.Appellees 22. The proper analysis, the state argues, would be based on the justification for the entire plan. "Allowing the states to compare, based on current census data, the ... population of majority-minority districts in the benchmark *plan* and the proposed *plan* simplifies the process." Br.Appellees 84 (emphasis added).

The state asserts that "[o]n appeal, the plaintiffs have renewed their statewide claims against the redistricting plans 'as a whole.'" Br.Appellees 15. But the phrase "as a whole" is not a quote from our opening brief. Rather, that brief repeatedly refers to *Shaw*

violations as having occurred in "*each* majority-black district." ALBC Br. 5, 11, 12, 13, 14, 15, 21, 25, 27, 29, 31 (emphasis added). Our challenge to the "district-specific racial ratios" obviously encompassed a challenge to each specific district racial ratio. ALBC Br. 15, 27, 38, 40, 41. We objected to "[t]he drafters' determination to maintain the existing black percentage in *all* of the majority-black districts." ALBC Br. 29 (emphasis added); see Br.Appellees 16 ("The plaintiffs do not argue that all the majority-black ... districts are problematic.").

(2) The United States does not question the propriety of a single action asserting that multiple districts violate *Shaw*. It argues, however, that in such a case there must always be separate individualized findings with regard to each challenged district.

While district-specific findings would often be appropriate, that is not invariably the case. *Shaw* is a case about motive, and a single overriding motive could animate the creation of multiple districts. Of course, if a plaintiff seeks to establish the existence of an overriding racial purpose by pointing to district-specific circumstantial evidence, such as the unusual shape of a particular district, or a state offered district-specific justifications, that evidence would have to be evaluated on a district-specific basis. But where a plaintiff offers non-district-specific evidence which establishes that a state acted with an overriding racial purpose in drawing multiple challenged districts, such as testimony by the framers of those districts, and a state offers in response only a justification that

applies equally to all of those districts, district-specific findings would serve no purpose. In this case the undisputed purpose common to all the districts constituted an overriding racial motive, and the state has never claimed that in any district that racial purpose was subordinated to some other state policy (other than one-person, one-vote).

The government contends that "[t]his Court has performed these district-by-district assessments even in the presence of evidence that the plan drafters had overarching statewide goals relating to race." U.S.Br. 16. That is not correct. In *Miller v. Johnson,* 515 U.S. 900, 917 (1995),[4] *Shaw v. Hunt*, 517 U.S. 899, 906 (1966),[5] and *Hunt v. Cromartie*, 516 U.S. 541, 547 (1999)[6] there was no evidence of "overarching statewide goals," only evidence about the purpose of the single specific district in question. *Bush v. Vera,* 517

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[4] "[E]vidence show[ed] that the General Assembly was motivated by a predominant overriding desire to ... permit the creation of a third majority-black district...."

[5] The state deliberately drew "District 12" to have a black majority. After the Attorney General rejected a plan creating only a single majority-black district, there was evidence that the state intended "to create two congressional districts with effective black voting majorities" (quoting Section 5 submission). The state conceded it intend to "create[ ] two districts in a way as to assure black-voter majorities." (Quoting *Shaw v. Barr*, 808 F.Supp. 461, 470 (E.D.N.C. 1992)).

[6] There was evidence based on "maps of District 12," "the district's low scores with respect to ... compactness" and the fact that "the State had ignored traditional districting criteria in crafting the new Twelfth Congressional district."

U.S. 952 (1996) did not rest on "direct evidence of statewide race-related objectives" (U.S.Br. 17), but only on evidence about the purpose of the three specific districts being challenged. Although there was direct evidence in that case about the purpose of each challenged district, the Court looked to the actual design of the districts in question because the testifying officials had made "inconsistent statements." 517 U.S. at 970. In the instant case the drafters' testimony about their racial purpose is entirely consistent.

The government argues that "[a]n analysis of whether race predominates in a plan 'as a whole' is overbroad, ... because it enables plaintiffs to challenge districts in which they do not themselves reside." U.S.Br. 17. In a *Shaw* case challenging multiple districts, the plaintiffs must establish standing to challenge each district in question; the court below held that ALBC had done so. J.S.App. 134-37. But that standing requirement has no bearing on the manner in which the merits of such a case should be analyzed.

II. The Undisputed Facts Demonstrate That Achieving The District-Specific Racial Ratios Was The Overriding Purpose of The Redrawn Majority-Black Districts

(1) The linchpin of the claims in this case is the insistence by state officials that they acted in the belief that Section 5 of the Voting Rights Act required them to repopulate each of the majority-black districts

in a manner which would match as precisely as possible the racial composition of the original district. The state argues that a mere commitment to complying with the Voting Rights Act does not, without more, establish a *Shaw* violation. "The plaintiffs' theories rest on the notion that whenever a non-lawyer state legislator testifies that he prioritized compliance with the Voting Rights Act as a general matter, race is *per se* the driving factor.... But.... a drafter must always.... prioritize compliance with the Voting Rights Act." Br.Appellees 23. But the claim in this case does not rest on the drafters' mere determination to comply with the Voting Rights Act "as a general matter." Rather, there was specific, consistent and undisputed testimony by those drafters that they had drawn the district lines based on the belief that "compliance with the Voting Rights Act" required achieving wherever possible the district-specific racial ratios.[7] The state does not contend that this was mere loose talk,[8] or the ill-chosen words of laymen untutored in the law; to the contrary, in his brief in this Court, Alabama's highest legal official steadfastly insists (albeit mistakenly) that Section 5 imposes precisely the rigid requirement which the drafters testified they were compelled to satisfy. Br.Appellees 79-82.

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[7] ALBC Br. 22-25.

[8] See Br.Appellees 7 ("the drafters decided to avoid reducing the black population of preexisting majority-black districts where possible"), 20 ("The drafters tried to avoid reducing the black population in preexisting majority-black districts as a strategy to comply with Section 5.").

The state does not defend the actual reasoning of the district court. The court below asserted that race could not be the predominant motive for the challenged districts because the drafters had attached priority to population equality. See ALBC Br. 27-28, U.S.Br. 8, 12, 18-20. In this Court, the state does not contend that compliance with one-person one-vote would defeat a *Shaw* claim, and insists the lower court must have meant something else. Br.Appellees 32. The district court argued that achieving the district-specific racial ratios could not have been a predominant motive, because the 2012 plan actually lowered the black proportion of most districts, comparing that plan with the population of the 2001 districts under the 2000 census. See ALBC Br. 35-37. In this Court, the state does not contend that the effect of the changes made by the 2012 plan should be measured against decade-old census figures, and suggests the lower court must have been making some other point. Br.Appellees 41. The district court opinion rested on several other arguments that the state neither reiterates nor defends: that achievement of the district-specific racial ratios was subordinated to some other never-identified goal (ALBC Br. 35), that the drafters permissibly balanced below-ratio districts with above-ratio districts (ALBC Br. 33), and that the division of precincts on racial lines is irrelevant so long as a larger number of other precincts are divided for non-racial reasons. ALBC Br. 47-48.

(2) One of the most striking examples of the overriding importance the drafters attached to achieving the district-specific racial ratios was the cannibalization of majority-black HD 53, a step avowedly taken so that the black population of that district could be divided up among the remaining majority-black House districts in Jefferson County. ALBC Br. 38-41. The state's only comment on that action is to call attention to the age and health of the black incumbent in HD 53. "The drafters chose to eliminate HD 53 because they believed that the incumbent from that district intended to retire because of his age." Br.Appellees 12-13; see *id.* at 46 ("[T]he drafters intentionally chose to consume the district of an older representative, who was in poor health and who they believed would not run again."). But Hinaman was absolutely clear in explaining that he was determined to cannibalize a majority-*black* district in order to preserve the black percentages in the other majority-black districts. Tr. v. 3, pp. 132, 155. In selecting which of the majority-black districts would be dismembered, Hinaman may have considered the comparative ages and health of the incumbents from those districts, but it is undisputed that Hinaman would not have repopulated the majority-black districts with the population of a majority-white district, even if the incumbent Representative from the majority-white district was deceased.

Although preserving existing precincts is a traditionally important districting criterion in Alabama, in the court below it was undisputed that the

drafters had divided precincts along racial lines in order to achieve the district-specific racial ratios. By placing in a majority-black district only the portion of a precinct in which blacks were more concentrated, and putting the rest in an adjoining majority-white district, the drafters were able to meet or come as close as possible to the district-specific racial ratio. Hinaman candidly acknowledged having done this. ALBC Br. 47-48. The district court found that precincts were divided to achieve those ratios. J.S.App. 104. The plaintiffs offered expert testimony about the race-based division of precincts,[9] and the record contained a detailed racial breakdown of every precinct in the state which had been divided between or among several districts. Docs. 140-1, 140-2; SDX 405, 475. The state's post-trial brief did not deny that precincts had been divided along racial lines,[10] presumably because the record contained the racial composition and allocation of every divided district.

In this Court, the state does not exactly deny that race-based precinct splitting occurred;[11] it nonetheless objects that "plaintiffs have never identified any specific precinct that they allege was split because of

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[9] NPX 323 (Arrington Report) at 35-38.

[10] Doc. 196.

[11] See Br.Appellees 55 ("We concede that the political consultant who drew the maps testified that he *may* have split *some* precincts ... *somewhere* on the basis of race.") (emphasis in original).

race." Br.Appellees 54.[12] That is not correct; one of the plaintiffs' post-trial briefs repeatedly identified precincts that had been divided on racial lines.[13] We set out in an appendix to this brief the record evidence regarding the racial composition of each of the precincts that was divided between a majority-black and majority-white district. Brief Appendix ("Br.App.") 9a-21a. The race-based nature of those divisions is stark. There are 84 precincts that were divided between majority-black and majority-white Senate districts. In 83 of those precincts a disproportionate part of the black residents was placed in the majority-black district, and in 6 instances *all* of the black residents of the precinct were placed in a majority-black district.[14] Of the 154 precincts divided between majority-black and majority-white House districts, blacks are disproportionately placed in the majority-black district in 147 precincts, including 15 precincts in which *all* the black residents were put in the majority-black district.

The redistricting of SD 26 also illustrated the overriding importance of the drafters' racial goals. First, although the state argues that "[c]hanging all the districts 'as little as possible' was an express goal" (Br.Appellees 42), SD 26 was geographically dismembered. Most of the land area of the old SD 26 was

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[12] See Br.Appellees 54 ("plaintiffs ... have never pointed to one [district] and said, 'this precinct was split because of race.' ").

[13] Doc. 195-1, ¶¶ 50, 191, 205, 211, 218, 219, 251.

[14] The sole exception, Birmingham Botanical Gardens in Jefferson County, had only 12 black residents.

transferred to SD 25, including the entire southern half of Montgomery County and parts of the northwestern part of the County; that removed 12,000 of the original residents of SD 26, even though SD 26 was already under-populated. Br.Appellees 59. Second, the drafters systematically divided on racial lines the precincts that were made part of both SD 25 and SD 26. The state asserts that "[t]he plaintiffs say that the drafters split precincts between SD 25 and SD 26 along racial lines, but they have never identified any precinct that they allege was split because of race." Br.Appellees 60. That is incorrect; one of the plaintiffs' post-trial briefs pointed out that "the Senate plan raised the black percentage in Senate district 26 ... by splitting precincts 1A, 1B, 1C, 1D, 3F, 3G and 5M along racial lines...." Doc. 195-1, ¶ 54. Those seven precincts were demonstrably divided on racial lines. See Br.App. 11a.

	SD 25		SD 26	
Precinct	White	Black	White	Black
1A	5444	1120	248	689
1B	2787	992	2273	3322
1C	2085	1335	941	2651
1D	1441	319	1345	3054
3F	5319	1206	344	435
3G	709	609	336	1755
5M	5463	2213	251	532
Total	23,248	7794	5738	12,438

80.20% of the whites in the seven precincts were placed in majority-white SD 25, while 61.48% of the blacks were districted in majority-black SD 26.

Hinaman was extensively questioned at trial about the redistricting of SD 26, and he gave three reasons: he would not "retrogress" SD 26, SD 25 was underpopulated, and he transferred part of SD 26 to SD 25 to build a land bridge so he could add majority-white Crenshaw County to SD 25. Tr. v. 3, 174-82. As we noted in our opening brief, and the state does not appear to deny, SD 25 was actually *over*populated. ALBC Br. 50-51 n.93; see Br.Appellees 59 ("overpopulated SD 25"), Doc. 195-1, p. 190. That leaves only Hinaman's race-based account to explain the redistricting of SD 26. The district court correctly concluded that this districting scheme was racially motivated. J.S.App. 152.

In this Court, counsel for the state proposes an entirely new set of explanations for the redrawing of SD 26, reasons never advanced by Hinaman at trial, and insists that the redistricting of SD 26 had nothing to do with race. Br.Appellees 59-62. But this Court has made clear that non-racial explanations cannot be adduced by "argument of counsel." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255 n.9 (1981). The speculative contentions of a defendant's attorney are no substitute for sworn testimony. If the state thought Hinaman had other reasons for refashioning SD 26, it had every incentive and opportunity to elicit those reasons at trial, a point in the proceedings at which Hinaman (unlike the state's counsel) could have been cross-examined, and at which the plaintiffs could adduce responsive evidence.

The newly proffered explanations of SD 26 make little sense. In one passage the state explains that the rural areas outside the city of Montgomery were removed from SD 26 so it would "*become* a[n] ... urban district." Br.Appellees 26 (emphasis added). Changing a district from a combination of urban and rural areas into an "urban district" is certainly not consistent with altering the district "as little as possible." Br.Appellees 42. In another passage the state argues that excising the large rural areas from SD 26 "*preserved* [SD 26] as an urban district" (Br.Appellees 19) (emphasis added), as if SD 26 had really been an "urban" district all along, and the large rural areas it previously included were compromising its urban essence. The state argues that it would have made no sense to add rural Crenshaw County to SD 26, because SD 26 was "a district centered on the urban core of the City of Montgomery" (Br.Appellees 61), even though a majority of geographic area of the original SD 26 was actually rural. Swapping more urban areas of SD 25 for more rural areas of SD 26, the state explains, "preserved ... SD 25 as a rural and suburban district" (Br.Appellees 19), as if the previous inclusion of urban areas in SD 25 was somehow a threat to its inherently rural and suburban nature. This is all fairly implausible.

(3) Although the drafters insisted they believed that the Voting Rights Act required them to add areas to each majority-black district that would match or exceed the district's existing black population percentage, the state repeatedly argues that requirement

had no actual effect on how the district lines were drawn. Rather, the state seems to contend, the district lines were all actually drawn based entirely on race-neutral considerations, which just happened to result in the very districts the drafters would have drawn if they had acted on the perceived racial requirements. If the drafters never acted on any racial motives at all, racial purposes could not have predominated. This contention, which the state did not advance in the trial court, is inconsistent with the findings of the district court and wholly belied by the record.

The state asserts that "[t]he district court ... explained that, when the drafters changed majority-black districts, they did so based on race-neutral redistricting criteria. J.S.App. 142-43." Br.Appellees 46. The cited portion of the district court opinion actually says the opposite. "[R]ace was a factor in the creation of the districts." J.S.App. 143. "[T]he consistent testimony of Senator Dial, Representative McClendon, and Hinaman established that the Legislature ... considered race...." J.S.App. 142. "The record does not reflect a history of *purely* race-based districting revisions." J.S.App. 143 (quoting *Vera*, 517 U.S. at 959) (emphasis in *Vera*). The district court explained that satisfying the perceived requirements of the Voting Rights Act was the Legislature's priority; "neutral redistricting principles" were only applied "when feasible." J.S.App. 142.

Alabama argues that asserted close similarities between its plan and the plans proposed by black

legislators and ADC demonstrate that the composition of the majority-black districts in the state plan were simply the result of demographics. "If the drafters had the 'predominant' statewide goal of 'packing' districts with 'supermajority percentages' of black persons, then we would expect to see stark differences between their plans and the plaintiffs' plans, which do not share that goal. But we do not. In the House plan, the Legislature's plan has 23 districts that are over 59%; Rep. McClammy's plan has 22." Br.Appellees 36-37. This passage somewhat misstates the issue. The *Shaw* claim before the Court is that the state's predominant purpose was to meet varying district-specific racial ratios, whether or not they might be labeled "supermajorities," and the record does not reveal the basis on which the McClammy and ADC plans were drafted. But the Knight and Sanders plans were based largely on race-neutral principles, and sought to achieve only the far more modest goal of preserving the existing number of majority-black districts.[15] So if the districts in the

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[15] The Knight and Sanders plans, HB16 and SB5, were drawn to comply with *Shaw* standards by following Alabama's traditional districting principles while observing opportunities to provide black voters equal opportunities to elect candidates of their choice. These plans rebut the state's argument that plaintiffs failed to suggest any remedial standard. Br.Appellees 27-30. They split significantly fewer counties than do the enacted House and Senate plans, split no precincts in the Sanders Senate plan, and only 11 precincts in the Knight House plan. APX 20-21; APX 69; Tr. v. 1 at 218-21. They stay within, but do not attempt to manipulate, the plus or minus 5% deviation that

(Continued on following page)

Knight plan had the same racial composition as those in the state plan, the state's argument would have some cogency.

The state asserts that "Rep. Knight's majority-black districts ... are similar to those in the drafters' plan in many of the majority-black House districts." Br.Appellees 38. But the Knight plan and the state plan are actually quite different. See Br.App. 1a-2a. In the Knight plan there are only 13 districts over 59%, compared to 23 in the state plan. Conversely, under the Knight plan there are 15 House districts under 60%, compared to only 5 under the state plan. 18 of the Knight House districts have a smaller proportion of black voters than in the state plan. Alabama contends that "demographic reality explains why the black populations of some of the *plaintiffs'* proposed districts are similar to the drafter's purported 'quota[ ]'... only one percentage point away from the 'quota' .... " Br.Appellees 4 (emphasis in original). In fact, however, only two Knight House districts[16] are within one percent of its racial composition of the 2001 plan under the 2010 census, compared to 13 of the House districts under the state plan. See App. 3a-6a. The state asserts that "[t]he only real difference in the House is in the Birmingham districts (HD 52-60) because the plaintiffs' plans

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constitutes substantial population equality. In fact, 18 of the 27 majority-black House districts and 4 of the 8 majority-black Senate districts are overpopulated. APX 21, 23.

[16] The similar percentage for the two iterations of HD 53 is entirely coincidental; the two versions are located 100 miles apart.

manipulate the area's black population to create a new 30% black district that could be won by a white Democrat (HD 54), eliminating a majority-black district from the statewide plan." Br.Appellees 37. Actually the Knight plan has 9 majority-black districts in Birmingham (Jefferson County), compared to 8 in the state plan.

The state insists that the black proportion of each district in its plan changed little because "[i]f the Legislature draws a new district in the same geographical area as the old one, it will contain the same or *similar* people." Br.Appellees 45 (emphasis added). But as the state elsewhere notes, generally "the drafters repopulated the[ ] [underpopulated] majority-black districts by removing contiguous population from majority-white districts." Br.Appellees 4-5. The majority-white districts adjoining those underpopulated majority-black districts typically had few concentrations of black residents. In Jefferson County, for example, the area of the county outside of the majority-black House districts (as they existed under the 2001 lines) was only 18.06% black;[17] as Hinaman pointed out, indeed complained, repopulating the black districts from the contiguous majority-white districts was certain to lower significantly the black population percentage in those majority-black districts. Tr. v. 3, 131-33.

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[17] That area contained 325,204 residents, of whom only 58,726 were black. SDX 401, 404.

A review of the specific manner in which the drafters constructed the districts makes clear the pervasive importance of race. The lines of the eleven majority-black Jefferson County and Montgomery County House districts were shaped by the race-based cannibalization of HD 53 and HD 73. In any district in which the minority percentage declined under the 2012 plan, Hinaman by his own account would have taken whatever race-conscious measures which could limit that decline, so that the district would be as close as possible to the percentage under the 2001 lines. Tr. v. 3 at 143. In almost half the House districts the minority population was within 1% above the 2001 plan. ALBC Br. 30, 6a-7a. That surely was not coincidental; these are the districts where the racial strategy was used with particular success and precision. Even in a district where the black population percentage rose, that could still be the result of a race-based decision, as was the case in SD 26. Throughout the state, the precincts that were divided between black and white districts were drawn to separate residents along racial lines. At best, Hinaman would have been content with district lines produced purely by applying race-neutral criteria only if they happened to result in a district with just the right black population percentage, or higher. Drawing district lines on such a basis is not a race-neutral system.

(4) The state argues that achieving the district-specific racial ratios could not have been the predominant purpose in the redrawing of the majority-black

districts because "the racial percentages of many of the *majority-white* districts are substantially the same between the old and new plans." Br.Appellees 44 (emphasis in original). It points to a group of "selected majority-white House districts" whose black population percentage did not change significantly under the 2012 plan. Br.Appellees 44-45. It is not clear how this diminishes the importance of achieving the district-specific racial ratios. There is no dispute that the 2012 plan added 121,000 blacks to the majority-black House districts, and 105,000 blacks to the majority-black Senate districts, and all of that net addition had to come from somewhere outside the majority-black districts to which they were added. See App. 7a-8a. Similarly, the state argues that in at least some instances the blacks added to the majority-black districts did not come from so-called "influence districts." Br.Appellees 48-52. But that argument in no way diminishes the significance of the state's overriding intent to repopulate the majority-black districts in a race-conscious manner that would achieve a particular racial composition. None of this Court's post-*Shaw* decisions turned on, or even discussed, the districts *from which* minorities had been taken to construct a challenged minority district.

(5) The decision of the Department of Justice to preclear the state's plan is of no relevance to the *Shaw* claims in this case. The Department has no authority to reject a submission because it is unconstitutional. U.S.Br. 7 n.1. The Department considers the extent to which black voters are over-concentrated in minority districts only to the extent that

it may bear on whether a plan reduced the ability of blacks to elect candidates of their choice. The Department had precleared the plans found to violate *Shaw* in *Shaw II*, *Miller*, and *Vera*. The objections voiced by plaintiffs to the Section 5 submission, that Alabama had packed blacks into majority-black districts for the purpose of diluting their political influence, is not "the same.... claims ... that they are making here." Br.Appellees 19. As the district court correctly understood, a claim of invidiously motivated packing is distinct from a *Shaw* claim, which does not require proof of such a discriminatory purpose. *Compare* J.S.App. 129-33 (claim of invidious discriminatory purpose) *with* J.S.App. 140-86 (*Shaw* claim).

III. REMAND IS NOT WARRANTED ON THE GROUNDS SUGGESTED BY THE UNITED STATES

The government suggests that "[a]nalysis of the evidence concerning each district is ... required because some majority-black districts deviated significantly from the goal of maintaining the same percentage of black residents...." U.S.Br. 20-21. But the drafters testified consistently and emphatically that a district only "deviated significantly" from that goal when they could not find sufficient concentrations of black voters in the adjacent districts. ALBC Br. 33-34. The state has never contended that this occurred because the drafters decided in drawing a particular district to subordinate that racial goal to some race-neutral purpose, other than one-person,

one-vote. Doing so would have made no sense, on the state's own account, because the drafters insisted that meeting that goal (where possible) was required by the Voting Rights Act. There simply is no contested issue of fact regarding this question.

The United States also argues that "[a]nalysis of the evidence concerning each district is ... required because in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles." U.S.Br. 21. But the controlling issue under *Shaw* is the *purpose* for which the state acted – whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within ... a particular district." *Miller*, 515 U.S. at 916. Here there is an abundance of evidence that the drafters attached that unusual degree of importance to their racial goal, including the variety of ways in which they repeatedly overrode traditional districting principles to achieve it. In light of the palpable determination of the drafters to override traditional districting principles whenever necessary to achieve the district-specific racial ratio, it does not matter whether there might have been a district where they did not need to do so. The state does not contend that the drafters cared less about meeting that goal – or about obtaining preclearance – when they "plac[ed] ... voters within a particular district" than they did when they placed voters in other districts.

The government urges that the case be remanded to "resolv[e] disputed questions concerning the population levels needed to preserve black voters' ability to elect candidates of choice. See J.S. App. 106-07, 164-65 (describing conflicting evidence regarding necessary population levels in Alabama before the district court)." U.S.Br. 34. But the conflicting evidence before the district court would be relevant only if "the institution that ma[de] the racial distinction ... had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embark[ed] on an affirmative-action program.'" *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (1985) (plurality opinion) (emphasis in *Wygant*). When Alabama enacted the challenged plan, however, it assuredly lacked such a strong basis in evidence. The state relies primarily on a single statement by Senator Sanders,[18] who at one point suggested that majority-black districts be at least 62% black, but who later submitted a districting plan under which half the Senate districts were clearly below that level. Br.App. 5a. The defendants cannot make up for that wholly inadequate foundation at the time when the plan was enacted by adducing more probative evidence at trial years after the fact. Indeed, the drafters never

[18] The state describes Representative Jackson as saying that a minority district "should be" 62% or 65%. Br.Appellees 7. What he actually said was only that a district "could" be 62% or 65% without being packed. J.A. 178-79.

testified that they had ever reached, or acted on, any conclusion at all about the black population level needed to "preserve black voters' ability to elect candidates of choice." Hinaman denied ever having considered what size majority was needed to make the black vote effective. Tr. v.3 at 179-80. The state, without ever attempting to assess that black population level, simply assigned to each district a racial ratio based on whatever the ratio happened to have been under the earlier 2001 plan. That can no more satisfy strict scrutiny than assigning a racial ratio to each district based on the age of the incumbent.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

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Appendix A

Comparison of Black Population Percentages in Majority-Black Districts

HOUSE DISTRICTS

House District	Plan as Passed	Rep. Knight Plan	Difference (Knight-Passed)
19	61.25%	75.39%	14.14%
32	60.05%		
49		62.65%	
52	60.13%	54.07%	-6.06%
53	55.83%	55.86%	0.03%
54	56.83%	58.72%	1.89%
55	73.55%	64.03%	-9.52%
56	62.14%	54.02%	-8.12%
57	68.47%	60.27%	-8.20%
58	72.76%	61.09%	-11.67%
59	76.72%	61.27%	-15.45%
60	67.68%	59.55%	-8.13%
67	69.15%	69.43%	0.28%
68	64.56%	56.29%	-8.27%
69	64.21%	57.62%	-6.59%
70	62.03%	57.21%	-4.82%
71	66.90%	54.45%	-12.45%
72	64.60%	56.25%	-8.35%
76	73.79%	83.58%	9.79%
77	67.04%	59.38%	-7.66%
78	69.99%	58.70%	-11.29%
82	62.14%	53.63%	-8.51%
83	57.52%		

84	52.35%	71.97%	19.62%
85	50.08%	54.21%	4.13%
97	60.66%	57.19%	-3.47%
98	60.02%	63.75%	3.73%
99	65.61%	57.98%	-7.63%
103	65.06%	62.45%	-2.61%

SENATE DISTRICTS

Senate District	Plan as Passed	Senator Sanders Plan	Difference (Sanders-Passed)
18	59.10	58.49	-0.61%
19	65.31	65.30	-0.01%
20	63.15	62.82	-0.33%
23	64.84	57.75	-7.09%
24	63.22	56.90	-6.32%
26	75.13	71.28	-3.85%
28	59.83	51.55	-8.28%
33	71.64	71.83	0.19%

Source: Brief of Appellees 1a-6a.

Appendix B

Comparison of Black Population Percentages in Majority-Black Districts, 2001 Plan vs. Knight and Sanders Plans

House

House District	2001 Plan (2010 Census)	Rep. Knight Plan	Difference (Knight-2010)
19	69.82%	75.39%	5.57%
32	59.34%		
49		62.65%	
52	60.11%	54.07%	-6.04%
53	55.70%	55.86%	0.16%
54	56.73%	58.72%	1.99%
55	73.55%	64.03%	-9.52%
56	62.13%	54.02%	-8.11%
57	68.42%	60.27%	-8.15%
58	77.86%	61.09%	-16.77%
59	67.03%	61.27%	-5.76%
60	67.41%	59.55%	-7.86%
67	69.14%	69.43%	0.29%

68	62.55%	56.29%	-6.26%
69	64.16%	57.62%	-6.54%
70	61.83%	57.21%	-4.62%
71	64.28%	54.45%	-9.83%
72	60.20%	56.25%	-3.95%
76	69.54%	83.58%	14.04%
77	73.52%	59.38%	-14.14%
78	74.26%	58.70%	-15.56%
82	57.13%	53.63%	-3.50%
83	56.92%		
84	50.61%	71.97%	21.36%
85		54.21%	
97	60.66%	57.19%	-3.47%
98	65.22%	63.75%	-1.47%
99	73.35%	57.98%	-15.37%
103	69.64%	62.45%	-7.19%
Mean Difference			**-4.43%**
Median Difference			**-6.04%**

Rep. Knight renumbered HD 68 as HD 90, HD 76 as HD 73, HD 84 as HD 88, HD 103 as HD 101.

Blank cells indicate districts which are not comparable in the two plans.

Senate

Senate District	2001 Plan (2010 Census)	Senator Sanders Plan	Difference (Sanders-2010
18	59.92 %	58.49%	-1.43%
19	71.59 %	65.30%	-6.29%
20	77.82 %	62.82%	-15.00%
23	64.76 %	57.75%	-7.01%
24	62.78 %	56.90%	-5.88%
26	72.69 %	71.28%	-1.41%
28	50.98 %	51.55%	0.57%
33	64.85 %	71.83%	6.98%
Mean Difference			**-3.68%**

Median Difference	**-3.66%**

Sources: Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 13-14; Exhibits CE-46 and CE-47.

Appendix C

Selected Majority-White House Districts That Lost Black Population:

House District	2010 Black Percentage in Old Districts	2010 Black Percentage in New Districts
44	29.66%	11.7%
45	36.01%	15.5%
61	30.58%	19.1%
62	23.56%	15.8%
63	23.99%	13.6%
64	25.90%	14.5%
73	48.55%	10.5%
74	30.55%	24.7%
80	23.77%	17.6%

81	26.45%	20.1%
101	25.09%	17.2%

Appendix D

Precincts Divided Between Majority-Black And Majority-White Districts

SENATE DISTRICTS

County & Precinct	Black % of total pop. of part placed in black district	Black % of total pop. of part placed in white district
Choctaw Co.		
Bogueloosa	26.1%	6.8%
Branch-Bladon Springs	83.8%	18.9%
Butler-Lavaca-Mt. Sterling	36.8%	4.7%
Lusk-Pleasant Valley	74.5%	3.9%
Riderwood-Rock Springs	49.5%	0.0%
Silas-Souwilpa-Isney	50.8%	0.0%
Toxey-Gilbertown-Melvin	46.7%	8.5%
Clarke Co.		
Bashi Methodist Ch	48.3%	11.8%
Fulton City Hall	65.6%	33.3%
Jackson City Hall	73.1%	17.1%
Old Engineers Building	55.1%	25.0%
Overstreet Grocery	78.0%	17.5%
Skipper Fire Station	59.4%	20.2%
Thomasville Amory	84.0%	10.4%
Conecuh Co.		
Belleville Bapt Ch	78.1%	0.0%
Bermuda Comm House	53.5%	19.5%
Castleberry Fire Dept. -1	84.9%	7.3%

Herbert FD	36.0%	5.1%
Paul Fire Dept.	57.7%	1.6%
Hale Co.		
Havanna-A	42.6%	11.3%
Valley B	58.6%	19.4%
Valley C	63.6%	22.8%
Houston Co.		
Doug Tew Comm Ctr	50.9%	14.9%
Farm Ctr	71.8%	25.1%
Johnson Homes	91.7%	20.5%
Kinsey	53.6%	9.8%
Library	77.9%	11.8%
Lincoln Comm Ctr	82.0%	15.3%
Vaughn Blumberg Ctr	50.3%	24.4%
Wiregrass Park	64.1%	23.2%
Jefferson Co.		
B'ham Botanical Gardens	0.0%	1.2%
Fultondale First Bapt	39.4%	5.7%
Gardendale Civic Ctr	33.2%	4.9%
Hillview Fire Station #1	75.9%	2.9%
Homewood Public Library	41.4%	2.7%
Johns Comm Ctr	16.1%	4.2%
Maurice L West Comm Ctr	31.2%	5.2%
Mountain Brook City Hall	6.5%	0.2%
Mountain View Bapt Ch	25.2%	0.8%
Pinson UMC	65.4%	10.3%
Trussville First Bapt Ch	43.6%	3.9%
Valley Creek Bapt Ch	28.2%	11.0%
Lee Co.		
Auburn	70.7%	13.0%
Beuaregard School	35.2%	22.1%
Loachapoka	81.3%	16.4%
Marvyn	57.3%	19.7%
Waverly	84.9%	20.6%

Mobile Co.		
Chickasaw Auditorium	43.2%	18.8%
Morningside Elem School	77.1%	20.9%
Riverside Ch of Nazarene	57.3%	8.2%
St. Andrews Episcopal Ch	48.9%	5.2%
Monroe Co.		
Bethel Bapt House	81.0%	0.0%
Chrysler/Eliska/McGill	79.2%	15.2%
Days Inn/ Ollie	79.8%	29.1%
Mexia Fire Station	100.0%	12.1%
Monroe Beulah Ch	71.8%	13.5%
Monroeville Armory	51.4%	23.5%
Monroeville Housing Auth	72.3%	0.0%
Perdue Hill Masonic Lodge	78.3%	21.2%
Purdue Hill	44.2%	11.7%
Shiloh/Grimes	72.5%	4.5%
Montgomery Co.		
1A Cloverdale Comm Ctr	68.0%	16.6%
1B Vaughn Park Ch	55.6%	25.5%
1C Montgomery Museum	69.2%	37.1%
1D Whitfield Memorial Ch	66.9%	17.9%
3F Goodwyn Comm Ctr	54.2%	17.9%
3G Alcazar Shrine Temple	79.7%	43.2%
5M Bell Road YMCA	65.4%	24.7%
Pickens Co.		
Carrollton 4 Service Ctr	78.3%	28.1%
Russell Co.		
Austin Sumbry Park	47.1%	14.0%
Ladonia Fire Dept	85.9%	12.5%
National Guard Armory	60.9%	17.0%
Roy Martin Ctr	38.4%	14.2%
Seale Courthouse	42.8%	16.2%
Tuscaloosa Co.		
Fosters-Ralph Fire Dept	35.6%	16.1%
Hillcrest High School	31.9%	26.0%

Holt Armory	55.0%	23.2%
Jayces Park	61.7%	19.3%
McFaland Mall	52.9%	24.1%
Peterson Methodist Ch	50.4%	7.0%
Washington Co.		
Carson/Preswick	85.9%	17.0%
Cortelyou	66.0%	0.0%
Malcolm Voting House	75.0%	61.5%
McIntosh Voting House	73.4%	4.0%

HOUSE DISTRICTS

Autauga Co.		
Booth Vol Fire Dept	28.3%	17.0%
Safe Harbor Ministries	48.0%	12.1%
Baldwin Co.		
Tensaw Volunteer Fire Dept	76.9%	16.7%
Vaughn Comm Ctr	78.8%	14.1%
Bibb Co.		
Brent City Hall -14	68.2%	6.0%
Brent Nat Guard Armory	40.9%	17.3%
Eoline Fire Dept.-13	46.0%	7.3%
Eoline Fire Dept-4	2.2%	0.0%
Rock Bldg -15	54.0%	37.5%

Rock Bldg-6	18.6%	7.8%
Calhoun Co.		
2nd Presby Ch	44.3%	13.5%
Anniston	65.9%	10.2%
Eulaton/Bynum	14.1%	6.8%
Choctaw Co.		
Butler-Lavaca-Mt. Sterling	91.6%	32.9%
Crossroads-Intersection	81.1%	0.0%
Lisman-Pushmataha	89.0%	56.0%
Riderwood-Rock Springs	87.0%	34.9%
Clarke Co.		
Bashi Meth Ch	43.3%	11.6%
Fulton City Hall	61.6%	5.0%
Jackson City Hall	73.2%	17.6%
Old Engineers Bldg	56.4%	25.3%
Overstreet Grocery	78.0%	17.5%
Skipper Fire Station	61.0%	20.2%
Thomasville Nat Guard Amory	79.7%	7.7%
Conecuh Co.		

Brownville Fire Dept.	55.0%	40.4%
Castleberry Fire Dept. -2	84.9%	7.3%
Lyeffion Fire Dept.	36.4%	21.6%
Nazarene Bapt Ch	68.7%	88.7%
Repton City Hall	61.7%	13.0%
Second Mount Zion Ch	72.9%	71.4%
Greene Co.		
W Greene Fire Dept.	50.3%	8.3%
Houston Co.		
Doug Tew Comm Ctr	45.9%	8.0%
Farm Ctr	58.2%	25.1%
Johnson Homes	91.0%	5.8%
Kinsey	68.0%	10.3%
Library	68.4%	7.4%
Lincoln Comm Ctr	80.5%	14.8%
Vaughn Blumberg Ctr	46.8%	17.1%
Westgate Rec Ctr	57.6%	8.2%
Wiregrass Park	57.3%	15.1%
Jefferson Co.		

B'ham Botanical Gardens	1.0%	1.3%
Shades Cahaba Elem Sch	5.8%	3.6%
Airport Road Fire Station #8	46.9%	13.6%
Charles Stone Agr Ctr	66.9%	0.0%
Eastside Comm Ctr	54.5%	12.6%
Fire and Rescue Academy	64.0%	11.4%
Ridgecrest School	37.8%	12.4%
Sr Ctr	33.2%	4.7%
University Place School	42.4%	12.8%
Westlawn Mid Sch	18.6%	24.5%
Clearview Bapt Ch	48.3%	0.0%
Irondale Sr Cit Bldg	22.1%	59.9%
Mountain View Bapt Ch	39.5%	22.4%
Canaan Bapt Ch	12.6%	21.3%
Hunter Street Bapt Ch	20.0%	8.8%
Pleasant Grove First Bapt Ch	51.0%	21.6%
Pinson United Meth Ch	75.0%	16.3%
Fultondale Sr Citizen's Ctr	16.2%	8.0%
Gardendale Civic Ctr	47.3%	6.1%

Lee Co.		
Auburn	42.2%	11.8%
Beuaregard School	26.2%	7.5%
Opelika B	53.0%	10.6%
Lee County Snacks	34.8%	2.8%
Old Salem School	42.3%	8.9%
Smiths Station Sr. Ctr	36.7%	16.6%
Madison Co.		
Blackburn Chapel CP Ch	40.7%	14.9%
Chapman Mid Sch	93.4%	5.2%
Chase Valley United Meth	36.3%	7.7%
Ch of Christ Meridianville	65.5%	11.9%
Grace United Meth Ch	36.3%	28.5%
Harvest Bapt Ch	35.5%	31.2%
Mad Co Teacher Resource Ctr	19.2%	14.4%
Meridianville 1st Bapt Ch	47.0%	22.4%
Pineview Bapt Ch	33.3%	21.7%
Sherwood Bapt Ch	52.4%	20.1%
Marengo Co.		

Cornerstone Ch	86.7%	26.6%
Dixon's Mill	88.9%	7.3%
Octagon	90.9%	22.0%
Thomaston	69.0%	15.7%
VFW	62.9%	8.5%
Jefferson	85.4%	3.8%
Rangeline	5.9%	22.6%
Monroe Co.		
Days Inn/ Ollie	56.1%	10.7%
Excel/Coleman	48.0%	7.8%
Frisco City FD	49.4%	0.0%
Mexia Fire Dept	41.4%	6.6%
Monroeville Armory	45.4%	8.4%
Monroeville Housing Auth	72.3%	0.0%
Oak Grove Bapt	40.9%	0.0%
Purdue Hill	34.7%	0.0%
Shiloh/Grimes	75.9%	3.8%
Mobile Co.		
Chickasaw Auditorium	33.8%	28.8%

Saraland Civic Ctr	12.6%	0.0%
College Park Bapt Ch	32.1%	0.0%
First Bapt Ch of Axis	20.5%	1.6%
Havenwood Bapt Ch	39.4%	1.9%
Little Welcome Bapt Ch	71.9%	0.0%
Mt. Vernon Civic Ctr	64.6%	5.9%
Satsuma City Hall	50.6%	4.9%
Shelton Beach Rd. Bapt Ch	19.9%	3.5%
Turnerville Comm	7.5%	2.7%
Azalea City Ch of Christ	46.5%	15.2%
Friendship Missionary Bapt	77.9%	3.9%
Moffett Road Assembly of God	68.2%	30.2%
Semmes First Bapt	50.2%	11.8%
St. John United Meth Ch	60.4%	28.3%
University Ch of Christ	62.4%	28.5%
Bay of the Holy Spirit Ch	48.8%	28.9%
Dodge School	96.9%	20.6%
First Independent Meth	98.3%	21.7%
Hollingers Island School	5.6%	3.8%

Kate Shepard School	46.1%	7.6%
St Philip Neri Ch	74.4%	5.1%
The Mug Cafe	84.0%	31.0%
Montgomery Co.		
5M Bell Road YMCA	43.0%	15.5%
1B Vaughn Park Ch of Christ	56.6%	16.2%
3A Capitol Hts Bapt Ch	48.0%	28.5%
4N Highland Avenue Bapt Ch	56.4%	0.0%
3F Goodwyn Comm Ctr	60.6%	17.6%
4K Chisholm Comm Ctr	61.1%	0.0%
5B Snowdoun Womens Club	5.2%	0.0%
5D Ramer Library	96.8%	36.1%
5E Fitzpatrick Elem Schric	69.8%	0.0%
Pickens Co.		
Aliceville 2 Armory	81.9%	78.0%
Carrollton 4 Service Ctr	61.1%	31.9%
Russell Co.		
Austin Sumbry Park	34.4%	38.4%
Crawford Fire Dept	26.4%	15.0%

CVCC	64.4%	33.3%
Ladonia Fire Dept	85.9%	12.5%
Nat Guard Armory	66.2%	28.7%
Talladega Co.		
Bethel Bapt	75.8%	62.1%
Eastaboga Comm Ctr	33.8%	13.5%
Mabra-Kingston Bapt	71.6%	13.1%
Old Mumford High	74.1%	11.5%
Renfroe Fire Hall	49.1%	7.7%
Talladega Nat Guard Armory	60.7%	18.4%
Waldo City Hall	49.2%	13.2%
Winterboro Vol Fire	73.0%	14.5%
Tallapoosa Co.		
Dadeville Nat Guard Armory	60.9%	15.1%
Mary's Cross Road Voting House	65.1%	44.5%
Wall Street Comm Ctr	60.3%	17.8%
Tuscaloosa Co.		
Bama Mall	52.7%	5.0%

Holt Armory	64.9%	17.4%
Jayces Park	56.3%	0.0%
McFaland Mall	53.2%	20.0%
Peterson Meth Ch	91.8%	7.6%
University Mall	32.6%	31.8%
County Cthse	71.2%	12.9%
Frierson-Big Sandy Bapt Ch	39.4%	31.1%
Northport Comm Ctr	40.8%	21.7%
Washington Co.		
Carson/Preswick	85.9%	17.0%
Cortelyou	93.1%	31.1%
McIntosh Comm Ctr	96.4%	30.8%
McIntosh Voting House	77.1%	5.5%

Source documents: SDX 475 (Senate) and SDX 405 (House); the same documents are in Docs. 140-1 (Senate) and 140-2 (House).

Appendix E

These tables show the precincts split among two or more districts, at least one of which has a black majority (shown with shading). Source documents: SDX 475 (Senate) and SDX 405 (House); the same documents are in Docs. 140-1 (Senate) and 140-2 (House).

HD 19	HD	White	Black
Madison Co.			
Blackburn Chapel CP Ch	19	1068	781
Blackburn Chapel CP	6	122	23
Blackburn Chapel CP	53	138	169
Chapman Mid Sch	19	6	113
Chapman Mid Sch	21	3379	197
Chase Valley United Meth	19	1528	949
Chase Valley United Meth	21	979	87
Ch of Christ Meridianville	19	30	72
Ch of Christ Meridianville	21	3147	448
Ed White Mid Sch	19	1061	2653
Ed White Mid Sch	53	0	17
Grace United Meth Ch	19	569	372
Grace United Meth Ch	6	1039	559
Grace United Meth Ch	25	2102	877
Harvest Bapt Ch	19	2093	1292
Harvest Bapt Ch	6	755	373

Highlands School	19	199	358
Highlands School	53	666	1074
Lewis Chapel CP Ch	19	93	99
Lewis Chapel CP Ch	53	113	562
Mad Co Teacher Resource Ctr	19	145	37
Mad Co Teacher Resource Ctr	21	4184	747
Meridianville 1st Bapt Ch	19	377	378
Meridianville 1st Bapt Ch	21	1835	574
Pineview Bapt Ch	19	3643	2010
Pineview Bapt Ch	6	2738	805
Sherwood Bapt Ch	19	515	801
Sherwood Bapt Ch	25	2	0
Sherwood Bapt Ch	6	2523	716
St.Luke Missionary Bapt Ch	19	54	107
St.Luke Missionary Bapt Ch	53	1968	5037
HD 32	**HD**	**White**	**Black**
Calhoun Co			
2nd Presby/Mental Health/	32	1647	1436
2nd Presby/Mental Health/	36	6255	1027

Anniston	32	5257	11672
Anniston	36	1634	223
Anniston	40	320	21
Eulaton/Bynum/W Park Hts Bapt.	32	1929	328
Eulaton/Bynum/W Park Hts Bapt.	35	10584	827
Eulaton/Bynum/W Park Hts Bapt.	36	458	40
Eulaton/Bynum/W Park Hts Bapt.	40	866	59
Bethel Bapt	32	323	1041
Bethel Bapt	33	227	390
Eastaboga Comm Ctr/Old Lincoln High Gym	32	1908	1022
Eastaboga Comm Ctr/Old Lincoln High Gym	35	419	23
Eastaboga Comm Ctr/Old Lincoln High Gym	33	2875	671
Eastaboga Comm Ctr/Old Lincoln High Gym	36	1338	60
Limbaugh Comm Ctr- Bon Air- Oak Grove	32	682	1187
Limbaugh Comm Ctr- Bon Air- Oak Grove	33	6694	2263
Mabra-Kingston Bapt-Talla Co Central High	32	2082	6064
Mabra-Kingston Bapt-Talla Co Central High	35	310	48

Old Mumford High	32	133	409
Old Mumford High	35	2475	329
Renfroe Fire Hall - Stemley Fire Hall	32	950	966
Renfroe Fire Hall - Stemley Fire Hall	33	2429	210
Talladega Nat Guard Armory	32	1162	1958
Talladega Nat Guard Armory	35	545	1278
Waldo City Hall	32	28	29
Waldo City Hall	35	835	128
Winterboro Vol Fire-	32	422	1214
Winterboro Vol Fire-	33	1468	260
Winterboro Vol Fire-	35	179	25
Bethel Bapt	33	227	390
Bethel Bapt	32	323	1041

HD 52	HD	White	Black
Jefferson Co			
Birmingham Botanical	52	380	4
Birmingham Botanical	46	590	8
Ctr Street Mid Sch	52	7	656
Ctr Street Mid Sch	55	48	2432
Green Springs Bapt Ch	52	984	1765
Green Springs Bapt Ch	55	452	103
Ramsey HS	52	958	63
Ramsey HS	55	2646	1131
Ramsey HS	60	147	72

Shades Cahaba Elem Sch	52	1078	69
Shades Cahaba Elem Sch	46	2583	100
Southside Branch Pub Lib	52	551	184
Southside Branch Pub Lib	60	162	48
Madison Co Airport Road Fire Station #8	53	999	1219
Airport Road Fire Station #7	10	485	119
Blackburn Chapel CP	53	138	169
Blackburn Chapel CP	6	122	23
Blackburn Chapel CP	19	1068	781
Blackburn Chapel CP	53	138	169
Charles Stone Agr Ctr	53	779	1815
Charles Stone Agr Ctr	21	2	0

HD 53	HD	White	Black
Madison Co Eastside Comm Ctr	53	52	84
Eastside Comm Ctr	21	419	63
Ed White Mid Sch	53	0	17
Ed White Mid Sch	19	1061	2653
Fire and Rescue Acad	53	837	1710
Fire and Rescue Acad	21	506	68
Highlands School	53	666	1074
Highlands School	19	199	358
Lewis Chapel CP Ch	53	113	562
Lewis Chapel CP Ch	19	93	99

Ridgecrest School	53	1289	1079
Ridgecrest School	10	1744	288
Sr Ctr	53	1353	1032
Sr Ctr	10	155	15
St.Luke Missionary Bapt Ch	53	1968	5037
St.Luke Missionary Bapt Ch	19	54	107
University Place School	53	1603	1780
University Place School	6	1312	221
Westlawn Mid Sch	53	440	116
Westlawn Mid Sch	6	794	363

HD 54	HD	White	Black
Jefferson Co			
Brewster Road Bapt C	54	2562	3482
Brewster Road Bapt C	58	191	512
Ctr Point Cthse Annex	54	278	1118
Ctr Point Cthse Annex	58	2295	3779
Ctr Point Cthse Annex	59	82	132
Clearview Bapt Ch	54	155	396
Clearview Bapt Ch	58	487	232
Clearview Bapt Ch	44	3496	801
Crestwood Comm Educ	54	3175	1016
Crestwood Comm Educ	59	1	5

First United Meth Ch of Ctr Point	54	387	648
First United Meth Ch of Ctr Point	58	676	2165
Gate City Elem Sch	54	0	14
Gate City Elem Sch	58	38	1894
Gate City Elem Sch	59	19	277
Irondale Sr Cit Bldg	54	1667	621
Irondale Sr Cit Bldg	44	310	9
Irondale Sr Cit Bldg	45	1222	2587
Morton Simpson Comm Ctr	54	77	59
Morton Simpson Comm Ctr	59	33	1506
Mountain View Bapt Ch	54	584	410
Mountain View Bapt Ch	44	4759	1440
Norwood Comm Ctr	54	51	1169
Norwood Comm Ctr	59	57	874
Oporto Armory	54	14	291
Oporto Armory	58	131	1251
Oporto Armory	59	24	380
Our Lady of Lourdes Cath Ch	54	64	87
Our Lady of Lourdes Cath Ch	58	1079	3604
Robinson Elem Sch	54	79	338
Robinson Elem Sch	58	600	2541
Robinson Elem Sch	59	503	1390

Southtown Housing Comm Ctr	54	48	939
Southtown Housing Comm Ctr	60	204	37
Wilkerson Mid Sch	54	8	631
Wilkerson Mid Sch	60	50	475
Willow Wood Rec Ctr	54	183	1714
Willow Wood Rec Ctr	59	529	1714

HD 55	HD	White	Black
Jefferson Co			
Adamsville Bapt Ch	55	2287	780
Adamsville Bapt Ch	57	215	462
Adamsville Sr Cit Bldg	55	957	1253
Adamsville Sr Cit Bldg	57	285	346
Adamsville Sr Cit Bldg	60	40	8
Ctr Street Mid Sch	55	48	2432
Ctr Street Mid Sch	52	7	656
Glen Iris Elem Sch	55	2099	886
Glen Iris Elem Sch	60	466	233
Green Springs Bapt Ch	55	452	103
Green Springs Bapt Ch	52	984	1765
Legion Field Lobby	55	49	2069
Legion Field Lobby	60	40	2608
Ramsey HS	55	2646	1131
Ramsey HS	52	958	63
Ramsey HS	60	147	72

Sandusky Comm Sr Citizen's Park	55	76	17
Sandusky Comm Sr Citizen's Park	60	996	925
South Hampton Elem	55	11	75
South Hampton Elem	60	173	2768

HD 56	HD	White	Black
Jefferson Co			
Brooklane Comm Ctr	56	896	592
Brooklane Comm Ctr	57	1303	1377
Canaan Bapt Ch	56	1088	180
Canaan Bapt Ch	15	2728	779
Hunter Street Bapt Ch	56	1142	337
Hunter Street Bapt Ch	15	6482	753
Hunter Street Bapt Ch	46	1538	77
Mount Olive Bapt Ch	56	20	528
Mount Olive Bapt Ch	57	1	106

HD 57	HD	White	Black
Jefferson Co			
Adamsville Bapt Ch	57	215	462
Adamsville Bapt Ch	55	2287	780
Adamsville Sr Cit Bldg	57	285	346
Adamsville Sr Cit Bldg	60	40	8
Adamsville Sr Cit Bldg	55	957	1253
Brooklane Comm Ctr	57	1303	1377
Brooklane Comm Ctr	56	896	592

Mount Olive Bapt Ch	57	1	106
Mount Olive Bapt Ch	56	20	528
Pleasant Grove First Bapt Ch	57	3238	3450
Pleasant Grove First Bapt Ch	15	2223	631

HD 58	HD	White	Black
Jefferson Co			
Barrett Elem Sch	58	113	1400
Barrett Elem Sch	59	77	909
Brewster Road Bapt	58	191	512
Brewster Road Bapt	54	2562	3482
Ctr Point Cthse Annex	58	2295	3779
Ctr Point Cthse Annex	59	82	132
Ctr Point Cthse Annex	54	278	1118
Clearview Bapt Ch	58	487	232
Clearview Bapt Ch	44	3496	801
Clearview Bapt Ch	54	155	396
First United Meth Ch of Ctr Point	58	676	2165
First United Meth Ch of Ctr Point	54	387	648
Gate City Elem Sch	58	38	1894
Gate City Elem Sch	59	19	277
Gate City Elem Sch	54	0	14
Hilldale Bapt Ch	58	917	1960
Hilldale Bapt Ch	59	440	2454

Oporto Armory	58	131	1251
Oporto Armory	59	24	380
Oporto Armory	54	14	291
Our Lady of Lourdes Cath Ch	58	1079	3604
Our Lady of Lourdes Cath Ch	54	64	87
Pinson United Meth	58	100	334
Pinson United Meth	44	2571	545
Pinson United Meth	51	123	12
Pinson United Meth	59	616	2148
Robinson Elem Sch	58	600	2541
Robinson Elem Sch	59	503	1390
Robinson Elem Sch	54	79	338
Sun Valley Elem Sch	58	261	2484
Sun Valley Elem Sch	59	184	1394

HD 59	HD	White	Black
Jefferson Co			
Barrett Elem Sch	59	77	909
Barrett Elem Sch	58	113	1400
Ctr Point Cthse Annex	59	82	132
Ctr Point Cthse Annex	58	2295	3779
Ctr Point Cthse Annex	54	278	1118
Crestwood Comm Educ	59	1	5
Crestwood Comm Educ	54	3175	1016
Gate City Elem Sch	59	19	277
Gate City Elem Sch	58	38	1894
Gate City Elem Sch	54	0	14

Hilldale Bapt Ch	59	440	2454
Hilldale Bapt Ch	58	917	1960
Morton Simpson Comm Ctr	59	33	1506
Morton Simpson Comm Ctr	54	77	59
Norwood Comm Ctr	59	57	874
Norwood Comm Ctr	54	51	1169
Oporto Armory	59	24	380
Oporto Armory	58	131	1251
Oporto Armory	54	14	291
Pinson United Meth Ch	59	616	2148
Pinson United Meth Ch	51	123	12
Pinson United Meth Ch	44	2571	545
Pinson United Meth Ch	58	100	334
Robinson Elem Sch	59	503	1390
Robinson Elem Sch	58	600	2541
Robinson Elem Sch	54	79	338
Sun Valley Elem Sch	59	184	1394
Sun Valley Elem Sch	58	261	2484
Willow Wood Rec Ctr	59	529	1714
Willow Wood Rec Ctr	54	183	1714

HD 60	HD	White	Black
Jefferson Co			
Adamsville Sr Cit Bldg	60	40	8
Adamsville Sr Cit Bldg	57	285	346
Adamsville Sr Cit Bldg	55	957	1253
Fultondale Sr Citizen's Ctr	60	663	139
Fultondale Sr Citizen's Ctr	51	3136	316
Gardendale Civic Ctr	60	297	295
Gardendale Civic Ctr	51	12504	838
Glen Iris Elem Sch	60	466	233
Glen Iris Elem Sch	55	2099	886
Legion Field Lobby	60	40	2608
Legion Field Lobby	55	49	2069
Ramsey HS	60	147	72
Ramsey HS	55	2646	1131
Ramsey HS	52	958	63
Sandusky Comm Sr Citizen's Park	60	996	925
Sandusky Comm Sr Citizen's Park	55	76	17
South Hampton Elem	60	173	2768
South Hampton Elem	55	11	75
Southside Branch Pub Lib	60	162	48
Southside Branch Pub Lib	52	551	184
Southtown Housing Comm Ctr	60	204	37
Southtown Housing Comm Ctr	54	48	939

Wilkerson Mid Sch	60	50	475
Wilkerson Mid Sch	54	8	631
HD 67	**HD**	**White**	**Black**
Perry Co			
Nat Guard Armory	67	28	180
Nat Guard Armory	72	346	1462
Pinetucky	67	95	82
Pinetucky	72	110	8
UCH-Airport-Armory	67	37	69
UCH-Airport-Armory	72	1029	1124
Uniontown City Hall-Airport	67	41	112
Uniontown City Hall-Airport	72	330	1833
HD 68	**HD**	**White**	**Black**
Baldwin Co			
Tensaw Volunteer Fire Dept	68	**75**	**269**
Tensaw Volunteer Fire Dept	64	10	2
Vaughn Comm Ctr	68	**97**	**395**
Vaughn Comm Ctr	64	240	43
Clarke Co			
BASHI Meth Ch	68	1339	1056
BASHI Meth Ch	65	1671	226
Fulton City Hall	68	28	45
Fulton City Hall	65	865	47

Jackson City Hall	68	629	1816
Jackson City Hall	65	209	47
Old Engineers Bldg	68	210	279
Old Engineers Bldg	65	2281	786
Overstreet Grocery	68	79	287
Overstreet Grocery	65	228	50
Skipper Fire Station-Jackson Nat Guard	68	112	180
Skipper Fire Station-Jackson Nat Guard	65	3050	797
Thomasville Nat Guard Amory	68	264	1146
Thomasville Nat Guard Amory	65	131	11
Conecuh Co			
Brownville Fire Dept.	68	18	22
Brownville Fire Dept.	90	218	159
Castleberry Fire Dept. -2	68	32	191
Castleberry Fire Dept. -3	90	665	54
Lyeffion Fire Dept.	68	88	51
Lyeffion Fire Dept.	90	312	88
Nazarene Bapt Ch	68	128	283
Nazarene Bapt Ch	90	6	47
Repton City Hall	68	176	300
Repton City Hall	90	289	45
Second Mount Zion Ch	68	18	51
Second Mount Zion Ch	90	26	70

Marengo Co			
Cornerstone Ch	68	74	606
Cornerstone Ch	65	806	298
Demopolis HS	68	14	15
Demopolis HS	72	5	19
Demopolis HS	71	386	145
Dixon's Mill	68	133	1224
Dixon's Mill	65	215	17
Octagon	68	3	30
Octagon	65	169	48
Springhill Voting Booth	68	76	20
Springhill Voting Booth	71	205	49
Thomaston	68	168	400
Thomaston	65	156	30
VFW	68	341	589
VFW	65	280	28
Monroe Co			
Days Inn/ Ollie	68	177	244
Days Inn/ Ollie	64	331	42
Excel/Coleman	68	84	83
Excel/Coleman	64	3006	263
Frisco City FD	68	597	652
Frisco City FD	64	91	0
Mexia Fire Dept	68	291	223
Mexia Fire Dept	64	164	12
Monroeville Armory	68	1191	1036
Monroeville Armory	64	439	41

Monroeville Housing Auth	68	446	1243
Monroeville Housing Auth	64	46	0
Oak Grove Bapt	68	13	9
Oak Grove Bapt	64	64	0
Purdue Hill	68	67	41
Purdue Hill	64	18	0
Shiloh/Grimes	68	20	66
Shiloh/Grimes	64	25	1
Washington Co			
Carson/Preswick	68	25	207
Carson/Preswick	65	270	56
Cortelyou	68	9	176
Cortelyou	65	203	96
McIntosh Comm Ctr	68	12	747
McIntosh Comm Ctr	65	18	8
McIntosh Voting House	68	91	360
McIntosh Voting House	65	401	82

HD 69	**HD**	**White**	**Black**
Autauga Co			
Booth Vol Fire Dept	69	566	229
Booth Vol Fire Dept	42	630	133
Safe Harbor Ministries	69	263	245
Safe Harbor Ministries	42	2880	318
Safe Harbor Ministries	88	2775	503

Montgomery Co			
1F Al. Ind Dev Training	69	0	4
1F Al. Ind Dev Training	76	401	8528
2D Montgomery Boys Club	69	397	422
2D Montgomery Boys Club	78	1567	1668
2F Fire Station No. 14	69	243	1758
2F Fire Station No. 14	78	31	687
2G Hayneville Road Comm Ctr	69	118	693
2G Hayneville Road Comm Ctr	78	27	1713
2I Southlawn Elem Sch	69	82	354
2I Southlawn Elem Sch	78	54	3915
5B Snowdoun Womens Club	69	51	3
5B Snowdoun Womens Club	76	3	0
5B Snowdoun Womens Club	75	493	202
5D Ramer Library	69	2	61
5D Ramer Library	90	437	269
5E Fitzpatrick Elem	69	331	2276
5E Fitzpatrick Elem	76	943	4248
5E Fitzpatrick Elem	75	627	592
5N Peter Crump Sch	69	57	1624
5N Peter Crump Sch	76	117	1898

HD 70	HD	White	Black
Tuscaloosa Co			
Bama Mall	70	2375	3142
Bama Mall	63	460	25
Bama Mall	71	156	156
Holt Armory	70	1178	2471
Holt Armory	62	1525	354
Jayces Park	70	2536	3857
Jayces Park	63	29	0
McDonald Hughes Ctr	70	29	4010
McDonald Hughes Ctr	71	46	588
McFaland Mall	70	5680	7119
McFaland Mall	63	121	13
McFaland Mall	62	2209	600
Peterson Meth Ch	70	27	301
Peterson Meth Ch	62	2027	173
Southside Comm Ctr	70	1180	2770
Southside Comm Ctr	71	17	19
Stillman College	70	8	1073
Stillman College	71	301	5646
University Mall	70	39	28
University Mall	62	248	153

HD 71	HD	White	Black
Choctaw Co			
Butler-Lavaca	71	11	120
Butler-Lavaca	65	1985	998
Crossroads-Intersection-Halsell	71	108	471
Crossroads-Intersection-Halsell	65	15	0

Lisman-Pushmataha	71	90	817
Lisman-Pushmataha	65	47	61
Riderwood-Rock Spr	71	21	140
Riderwood-Rock Spr	65	361	195
Greene Co			
Eutaw Pre-School	71	50	489
Eutaw Pre-School	72	100	105
Greene County Cthse	71	14	21
Greene County Cthse	72	20	87
W Greene Fire Dept.	71	65	73
W Greene Fire Dept.	61	11	1
Marengo Co			
Demopolis HS	71	386	145
Demopolis HS	72	5	19
Demopolis HS	68	14	15
Jefferson	71	86	544
Jefferson	65	75	3
Rangeline	71	16	1
Rangeline	65	243	74
Springhill Voting Booth	71	205	49
Springhill Voting Booth	68	76	20

Pickens Co			
Aliceville 2 Nat'l Guard Armory	71	217	1155
Aliceville 2 Nat'l Guard Armory	61	345	1337
Carrollton 4 Service Ctr	71	396	677
Carrollton 4 Service Ctr	61	371	176
Sumter Co			
Coatopa Fire Dept	71	45	124
Coatopa Fire Dept	72	127	191
Livingston Comm Ctr	71	143	178
Livingston Comm Ctr	72	1373	2740
Tuscaloosa Co			
Bama Mall	71	156	156
Bama Mall	63	460	25
Bama Mall	70	2375	3142
County Cthse	71	45	116
County Cthse	63	4672	741
Frierson-Big Sandy Bapt Ch	71	1037	706
Frierson-Big Sandy Bapt Ch	62	2239	1031
McDonald Hughes Ctr	71	46	588
McDonald Hughes Ctr	70	29	4010
Northport Comm Ctr	71	2291	1700
Northport Comm Ctr	61	320	112
Southside Comm Ctr	71	17	19
Southside Comm Ctr	70	1180	2770

Stillman College	71	301	5646
Stillman College	70	8	1073
HD 72	**HD**	**White**	**Black**
Bibb Co			
Brent City Hall-14	72	1096	2435
Brent City Hall-15	49	63	4
Brent Nat Guard Armory	72	407	285
Brent Nat Guard Armory	49	1921	422
Eoline Fire Dept.-13	72	97	87
Eoline Fire Dept.-14	49	684	55
Eoline Fire Dept-4	72	390	9
Eoline Fire Dept-5	49	88	0
Rock Bldg -15	72	172	211
Rock Bldg -16	49	49	30
Rock Bldg-6	72	327	81
Rock Bldg-7	49	1278	112
Greene Co			
Eutaw Pre-School	72	100	105
Eutaw Pre-School	71	50	489
Greene County Cthse	72	20	87
Greene County Cthse	71	14	21
Marengo Co			
Demopolis HS	72	5	19
Demopolis HS	71	386	145
Demopolis HS	68	14	15

Perry Co			
Nat Guard Armory	72	346	1462
Nat Guard Armory	67	28	180
Pinetucky	72	110	8
Pinetucky	67	95	82
UCH-Airport-Armory	72	1029	1124
UCH-Airport-Armory	67	37	69
Uniontown City Hall-	72	330	1833
Uniontown City Hall-	67	41	112
Sumter Co			
Coatopa Fire Dept	72	127	191
Coatopa Fire Dept	71	45	124
Livingston Comm Ctr	72	1373	2740
Livingston Comm Ctr	71	143	178

HD 76	HD	White	Black
Montgomery Co			
1A Cloverdale Comm Ctr	76	1743	800
1A Cloverdale Comm Ctr	77	3949	1007
1E Aldersgate UMC	76	192	492
1E Aldersgate UMC	77	1207	5363
1F Al. Ind Dev Training	76	401	8528
1F Al. Ind Dev Training	69	0	4
2B Beulah Bapt Ch	76	54	4180
2B Beulah Bapt Ch	78	2	334
2B Beulah Bapt Ch	77	12	604

2H Harrison Elem Sch	76	21	1180
2H Harrison Elem Sch	78	16	123
5B Snowdoun Womens Club	76	3	0
5B Snowdoun Womens Club	69	51	3
5E Fitzpatrick Elem	76	943	4248
5E Fitzpatrick Elem	69	331	2276
5M Bell Road YMCA	76	1879	1918
5M Bell Road YMCA	75	2098	435
5M Bell Road YMCA	74	1737	392
5N Peter Crump Sch	76	117	1898
5N Peter Crump Sch	69	57	1624
HD 77	**HD**	**White**	**Black**
Montgomery Co			
1A Cloverdale Comm Ctr	77	3949	1007
1A Cloverdale Comm Ctr	76	1743	800
1B Vaughn Park Ch of Christ	77	2482	3802
1B Vaughn Park Ch of Christ	74	2578	512
1E Aldersgate UMC	77	1207	5363
1E Aldersgate UMC	76	192	492
2B Beulah Bapt Ch	77	12	604
2B Beulah Bapt Ch	78	2	334
2B Beulah Bapt Ch	76	54	4180

3A Capitol Hts Bapt Ch	77	222	236
3A Capitol Hts Bapt Ch	74	2013	876
4D Hamner Hall Fire Station	77	359	1192
4D Hamner Hall Fire Station	78	8	4
4F Newtown Comm Ctr	77	63	790
4F Newtown Comm Ctr	78	249	1247
4G King Hill Comm Ctr	77	51	97
4G King Hill Comm Ctr	78	1344	1244
4M McIntyre Comm Ctr	77	0	551
4M McIntyre Comm Ctr	78	52	2178
4N Highland Avenue Bapt Ch	77	834	1347
4N Highland Avenue Bapt Ch	74	4	0

HD 78	HD	White	Black
Montgomery Co			
2B Beulah Bapt Ch	78	2	334
2B Beulah Bapt Ch	76	54	4180
2D Montgomery Boys Club	78	1567	1668
2D Montgomery Boys	69	397	422

2F Fire Station No. 14	78	31	687
2F Fire Station No. 14	69	243	1758
2G Hayneville Road Comm Ctr	78	27	1713
2G Hayneville Road Comm Ctr	69	118	693
2H Harrison Elem Sch	78	16	123
2H Harrison Elem Sch	76	21	1180
2I Southlawn Elem	78	54	3915
2I Southlawn Elem	69	82	354
3F Goodwyn Comm Ctr	78	259	436
3F Goodwyn Comm Ctr	74	5404	1207
4D Hamner Hall Fire Station	78	8	4
4D Hamner Hall Fire Station	77	359	1192
4F Newtown Comm Ctr	78	249	1247
4F Newtown Comm Ctr	77	63	790
4G King Hill Comm Ctr	78	1344	1244
4G King Hill Comm Ctr	77	51	97
4K Chisholm Comm Ctr	78	974	1965
4K Chisholm Comm Ctr	74	10	0
4M McIntyre Comm Ctr	78	52	2178
4M McIntyre Comm	77	0	551

HD 82	HD	White	Black
Lee Co			
Auburn	82	4688	3865
Auburn	79	35614	5261
Beuaregard School	82	1121	418
Beuaregard School	79	128	1
Beuaregard School	83	1554	573
Beuaregard School	38	753	75
Opelika B	82	1663	416
Opelika B	79	928	81
Opelika B	83	6258	10704
Opelika B	38	7237	934
Tallapoosa Co			
Dadeville Nat Guard Armory	82	850	1389
Dadeville Nat Guard Armory	81	920	170
Mary's Cross Road Voting House	82	85	164
Mary's Cross Road Voting House	81	138	118
Wall Street Comm Ctr	82	507	817
Wall Street Comm Ctr	81	229	51

HD 83	HD	White	Black
Lee Co			
Beuaregard School	83	1554	573
Beuaregard School	38	753	75
Beuaregard School	79	128	1
Beuaregard School	82	1121	418
Lee County Snacks	83	1274	696
Lee County Snacks	38	103	3
Old Salem School	83	188	143
Old Salem School	38	1402	142
Opelika B	83	6258	10704
Opelika B	38	7237	934
Opelika B	79	928	81
Opelika B	82	1663	416
Smiths Station Sr. Ctr	83	220	138
Smiths Station Sr. Ctr	80	2665	437
Smiths Station Sr. Ctr	38	2596	643
Russell Co			
Austin Sumbry Park	83	495	271
Austin Sumbry Park	80	81	56
Crawford Fire Dept	83	1292	482
Crawford Fire Dept	80	1716	313
CVCC	83	741	1717
CVCC	80	16	9
Ladonia Fire Dept	83	7	61
Ladonia Fire Dept	80	6139	922
Nat Guard Armory	83	1257	2747
Nat Guard Armory	80	2592	1095
Seale Cthse	83	1455	681
Seale Cthse	84	0	27

HD 84	HD	White	Black
Russell Co			
Seale Cthse	84	0	27
Seale Cthse	83	1455	681

HD 85	HD	White	Black
Houston Co			
Doug Tew Comm Ctr	85	2181	2040
Doug Tew Comm Ctr	86	2908	262
Farm Ctr	85	495	767
Farm Ctr	86	3358	1188
Johnson Homes	85	314	4403
Johnson Homes	86	129	8
Kinsey	85	378	920
Kinsey	86	758	91
Library	85	1098	2840
Library	86	3278	270
Lincoln Comm Ctr	85	223	1037
Lincoln Comm Ctr	86	687	122
Vaughn Blumberg Ctr	85	1503	1493
Vaughn Blumberg Ctr	93	297	68
Westgate Rec Ctr	85	14	19
Westgate Rec Ctr	93	6824	641
Wiregrass Park	85	2813	4190
Wiregrass Park	86	2456	497

HD 97	HD	White	Black
Mobile Co			
100 Black Men of Greater Mobile	97	1	474
100 Black Men of Greater Mobile	98	9	2384
Augusta Evans School	97	1370	153
Augusta Evans School	99	324	426
Chickasaw Auditorium	97	2743	1143
Chickasaw Auditorium	96	163	79
Chickasaw Auditorium	98	942	827
Figures Rec Ctr	97	30	2821
Figures Rec Ctr	99	10	2134
Rock of Faith Bapt Ch	97	78	5319
Rock of Faith Bapt Ch	103	7	1459
Saraland Civic Ctr	97	161	101
Saraland Civic Ctr	98	1246	118
Saraland Civic Ctr	96	1982	237
St. Andrews Episcopal	97	545	567
St. Andrews Episcopal	103	1271	951
Vigor HS	97	38	824
Vigor HS	98	88	2898
Murphy HS Library	97	2550	212
Murphy HS Library	99	340	326

HD 98	HD	White	Black
Mobile Co			
100 Black Men of Greater Mobile	98	9	2384
100 Black Men	97	1	474

Chickasaw Auditorium	98	942	827
Chickasaw Auditorium	96	163	79
Chickasaw Auditorium	97	2743	1143
College Park Bapt Ch	98	1106	878
College Park Bapt Ch	102	156	0
College Park Bapt Ch	99	1103	209
First Bapt Ch of Axis	98	1790	496
First Bapt Ch of Axis	102	661	11
First Bapt Ch of Axis	96	490	8
Havenwood Bapt Ch	98	43	28
Havenwood Bapt Ch	102	3938	80
Joseph Dotch Comm. Ctr	98	24	2317
Joseph Dotch Comm. Ctr	99	5	235
Little Welcome Bapt	98	185	1238
Little Welcome Bapt	99	1059	2264
Little Welcome Bapt	101	87	19
Mt. Vernon Civic Ctr	98	415	859
Mt. Vernon Civic Ctr	102	520	111
Saraland Civic Ctr	98	1246	118
Saraland Civic Ctr	97	161	101
Saraland Civic Ctr	96	1982	237
Satsuma City Hall	98	369	403
Satsuma City Hall	96	3167	168
Shelton Beach Rd. Bapt Ch	98	2234	593
Shelton Beach Rd. Bapt Ch	96	695	27
Turnerville Comm	98	1167	96
Turnerville Comm	102	2994	86

Vigor HS	98	88	2898
Vigor HS	97	38	824
HD 99	**HD**	**White**	**Black**
Mobile Co			
Augusta Evans School	99	324	426
Augusta Evans School	97	1370	153
Azalea City Ch of Christ	99	935	836
Azalea City Ch of Christ	102	694	133
College Park Bapt Ch	99	1103	209
College Park Bapt Ch	102	156	0.
College Park Bapt Ch	98	1106	878
Figures Rec Ctr	99	10	2134
Figures Rec Ctr	97	30	2821
Friendship Missionary Bapt Ch	99	208	790
Friendship Missionary Bapt Ch	101	158	7
Joseph Dotch Comm. Ctr	99	5	235
Joseph Dotch Comm. Ctr	98	24	2317
Little Welcome Bapt Ch	99	1059	2264
Little Welcome Bapt Ch	101	87	19
Little Welcome Bapt Ch	98	185	1238
Moffett Road AOG	99	1567	3646
Moffett Road AOG	102	387	181

Murphy HS Library	99	340	326
Murphy HS Library	97	2550	212
Pleasant Valley Meth	99	1548	1072
Pleasant Valley Meth	103	420	475
Semmes First Bapt	99	393	437
Semmes First Bapt	102	5277	746
St. John UMC	99	1571	2572
St. John UMC	101	505	202
University Ch of Christ	99	508	927
University Ch of Christ	101	1323	594

HD 103	HD	White	Black
Mobile Co			
Bay of Holy Spirit Ch	103	2029	2705
Bay of Holy Spirit Ch	101	1626	738
Dodge School	103	1	123
Dodge School	104	5018	1370
First Independent Meth	103	2	119
First Independent Meth	104	3815	1117
Hollingers Island Sch	103	1482	95
Hollingers Island Sch	105	761	31
Kate Shepard School	103	316	304
Kate Shepard School	104	2058	176
Pleasant Valley Meth Ch	103	420	475
Pleasant Valley Meth Ch	99	1548	1072

Rock of Faith Bapt Ch	103	7	1459
Rock of Faith Bapt Ch	97	78	5319
St Philip Neri Ch	103	62	186
St Philip Neri Ch	105	3252	181
St. Andrews Episcopal	103	1271	951
St. Andrews Episcopal	97	545	567
The Mug Cafe	103	14	84
The Mug Cafe	101	2707	1358

SENATE

SD 18	**SD**	**White**	**Black**
Jefferson Co.			
Homewood Pub Lib	18	399	399
	16	5,952	170
Mountain Brook City Hall	18	844	60
	15	3,903	9
Birmingham Botanical Gardens	18	37	0
	15	933	12

Muscoda Comm Ctr	18	212	295
	18	439	22
	19	593	256
Robinson Elem	18	635	3,445
	20	547	824

SD 19	SD	White	Black

Jefferson Co.

Valley Creek Bapt Ch	19	327	130
	5	2,381	300
Pleasant Hill UMC	19	5,989	1,455
	18	2,966	443
Johns Comm Ctr	19	650	130
	5	641	29
Maurice L West Comm	19	1,049	493

Ctr	17	541	30
Hillview Fire Station #1	19	167	177
	17	425	14
	20	314	1,585
SD 20	**SD**	**White**	**Black**
Jefferson Co.			
Trussville First Bapt Ch	20	327	347
	17	8,695	366
Mountain View Bapt Ch	20	5,216	1,849
	17	127	1
Gardendale Civic Ctr	20	914	498
	17	11,887	635
Pinson UMC	20	1,318	2,785
	17	2,092	254

Fultondale First Bapt Ch	20	1,259	894
	17	1,490	94
SD 23	**SD**	**White**	**Black**
Clarke Co.			
Jackson City Hall	23	634	1,819
	22	204	44
Overstreet Grocery	23	79	287
	22	228	50
Skipper Fire Station-Jackson Nat Guard-Jackson Fire Dept.	23	123	184
	22	3,039	793
Old Engineers Building	23	236	297
	22	2,255	768

Thomasville Nat Guard Armory	23	5	76
	22	205	24
	24	185	1,057
Fulton City Hall	22	30	15
	22	811	33
	24	70	244
	23	82	59
Conecuh Co.			
Belleville Bapt Ch	23	145	563
	22	51	0
Castleberry Fire Dept. - 1	23	32	191
	22	665	54
Paul Fire Dept.	23	58	79
	22	120	2

Herbert FD	23	60	36
	22	129	7
Bermuda Comm House	23	79	91
	22	200	51
Marengo Co.			
Cornerstone Ch	23	605	836
	24	275	68
Monroe Co.			
Chrysler/Eliska/McGill	23	5	19
	22	560	110
Perdue Hill Masonic Lodge	23	57	271
	22	141	39
Purdue Hill	23	36	34
	22	49	7

Bethel Bapt House	23	266	1,266
	22	38	0
Days Inn/Ollie	23	18	71
	22	490	215
Monroeville Armory	23	695	784
	22	935	293
Mexia Fire Station	23	0	12
	22	699	99
Monroeville Housing Auth	23	446	1,243
	22	46	0
Monroe Beulah Ch	23	20	51
	22	119	19
Shiloh/Grimes	23	23	66
	22	21	1

Washington Co.			
Malcolm Voting House	23	6	18
	22	176	343
Mcintosh Comm Ctr	23	30	755
	22	0	0
Mcintosh Voting House	23	92	384
	22	400	58
Cortelyou	23	127	272
	22	85	0
Carson/Preswick	23	25	207
	22	270	56

SD 24	SD	White	Black
Choctaw Co.			
Butler-Lavaca-Mt. Sterlin	24	1,855	1,111
	22	141	7
Bogueloosa	24	702	251
	22	391	29
Toxey-Gilbertown-Melvin-Hurricane	24	388	344
	22	385	36
Branch-Bladon Springs-Cullomburg	24	59	326
	22	43	10
Silas-Souwilpalsney-Toomey	24	818	850
	22	237	0
Lusk-Pleasant Valley-Ararat	24	14	41
	22	755	32

Riderwood-Rock Springs	24	339	335
	22	43	0
Clarke Co.			
Bashi Methodist Ch	24	1,041	1,012
	22	1,969	270
Hale Co.			
Havanna-A	24	70	52
	14	47	6
Valley B	24	23	34
	14	29	7
Valley C	24	8	14
	14	44	13

Pickens Co.			
Carrollton 4 Service Ctr	24	155	603
	21	612	250
Tuscaloosa Co.			
Jayces Park	24	1,948	3,681
	21	617	176
Holt Armory	24	1,895	2,543
	21	808	282
Peterson Meth Ch	24	331	340
	21	1,723	134
McFaland Mall	24	5,600	6,923
	21	2,410	809
Hillcrest HS	24	645	311
	21	6,463	2,385

Fosters-Ralph Fire Dept	24	1,730	977
	21	239	47
SD 26	**SD**	**White**	**Black**
Montgomery Co.			
1A Cloverdale Comm Ctr	26	248	687
	25	5,444	1,120
1B Vaughn Park Ch of Christ	26	2,273	3,322
	25	2,787	992
1C Montgomery Museum of Fine Arts	26	941	2,651
	25	2,085	1,335
1D Whitfield Memorial UMC	26	1,345	3,054
	25	1,441	319
3F Goodwyn Comm Ctr	26	344	437
	25	5,319	1,206

3G Alcazar Shrine Temple	26	336	1,755
	25	709	609
5M Bell Road YMCA	26	251	532
	25	5,463	2,213
SD 28	**SD**	**White**	**Black**
Houston Co.			
Kinsey	28	774	969
	29	362	42
Johnson Homes	28	278	4,367
	29	165	44
Farm Ctr	28	223	666
	29	3,630	1,289
Doug Tew Comm Ctr	28	1,385	1,626
	29	3,704	676

Library	28	551	2,595
	29	3,990	556
Lincoln Comm Ctr	28	202	1,027
	29	708	132
Wiregrass Park	28	1,737	3,490
	29	3,532	1,197
Vaughn Blumberg Ctr	28	1,167	1,329
	29	633	232
Lee Co.			
Waverly	28	32	180
	27	198	53
Loachapoka	28	277	1,471
	27	1,148	249

Auburn	28	918	2,578
	27	38,132	6,513
	13	1,252	35
Beuaregard School	28	42	25
	27	3,514	1,042
Marvyn	28	167	240
	27	195	48
Russell Co.			
Roy Martin Ctr	28	1,601	1, 115
	27	4,724	818
Ladonia Fire Dept	28	7	61
	27	6,139	922
Seale Courthouse	28	705	556
	27	750	152

Nat Guard Armory	28	1,997	3,452
	27	1,852	390
Austin Sumbry Park	28	294	279
	27	282	48
SD 33	**SD**	**White**	**Black**
Mobile Co.			
Satsuma City Hall	33	0	0
	34	3,536	571
Chickasaw Auditorium	33	1,942	1,594
	34	1,906	455
Morningside Elem	33	922	3,647
	35	340	92
Riverside Ch of the Nazarene	33	503	709
	35	425	38

St. Andrews Episcopal Ch	33	1,438	1,496
	35	378	22

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 13-895 and 13-1138

In the Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,
APPELLANTS

v.

STATE OF ALABAMA, ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,
APPELLANTS

v.

STATE OF ALABAMA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

This brief addresses the following questions:

1. Whether the district court erred when it rejected claims that Alabama's redistricting plans drew district lines based predominantly on race.

2. Whether the district court erred when it determined that Alabama's use of race, even as a predominant districting criterion, was nevertheless narrowly tailored to achieve the compelling interest of complying with the Voting Rights Act of 1965.

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In the Supreme Court of the United States

No. 13-895

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case involves the constitutionality of redistricting plans that Alabama has defended, in part, on the grounds that the plans were designed to comply with the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (42 U.S.C. 1973 *et seq.*) The United States, acting through the Department of Justice, has a direct role in the VRA's enforcement. Accordingly, the United States has a substantial interest in the proper interpretation of both the VRA and the

related constitutional protections against racial discrimination.

STATEMENT

1. The drawing of legislative districts is a quintessential state sovereign function. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995); *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). Both the Constitution and federal statutory law, however, impose constraints on States' redistricting to prevent racial discrimination.

The Equal Protection Clause "prevent[s] the States from purposefully discriminating on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). State reapportionment statutes generally do not, by their terms, discriminate on the basis of race, because they typically draw lines between "tracts of land, or addresses," not between people. *Id.* at 646. But if race is the "dominant and controlling" or "predominant" consideration in a legislature's decision "to place a significant number of voters within or without a particular district," that use of race must be "narrowly tailored to serve a compelling state interest." *Shaw* v. *Hunt*, 517 U.S. 899, 902, 905 (1996) (*Shaw II*) (citation omitted); see also, *e.g.*, *Miller*, 515 U.S. at 913, 916. A plaintiff may show that race was the "predominant factor" in drawing a particular district "either through circumstantial evidence of a district's shape and demographics," or through more direct evidence showing that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Ibid.*

The VRA imposes additional obligations on States concerning the consideration of race in redistricting. Using its authority to enforce the Fourteenth and Fifteenth Amendments, Congress enacted the VRA to remove "the blight of racial discrimination in voting" that persisted after those amendments took effect. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA prohibits any jurisdiction from implementing voting practices that, based on the totality of circumstances, result in a racial minority or other protected class "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

In addition, Section 5 of the VRA created a preclearance regime for a limited set of jurisdictions identified in Section 4 of the Act. See 42 U.S.C. 1973b(b). Section 5 requires covered jurisdictions to obtain preclearance of changes to electoral practices, including districting changes, from either the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c(a). To obtain preclearance, a covered jurisdiction must demonstrate that a proposed change does not have the purpose and will not have the effect of discriminating based on race. *Ibid.* A measure cannot receive preclearance when it has the effect of "diminishing the ability of any citizens of the United States on account of race or color * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). At the time of the redistricting measures at issue in this case, Alabama was subject to Section 5. In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), however, this Court held that the coverage formula in Section 4(b) of the

VRA could no longer be used as a basis for requiring preclearance under Section 5. In light of *Shelby County*, Alabama is not currently required to comply with Section 5.

2. Alabama's bicameral legislature is divided into 35 Senate districts and 105 House districts. 13-895 J.S. App. 17 (J.S. App). The legislature represents a population 67% of whom identify as white non-Hispanics and 26% of whom identify as black, according to the 2010 census. *Id.* at 15. African-Americans constitute a majority of the population in the south-central region of the State. *Id.* at 19.

In 2010, after an election cycle that gave Republicans control of both houses of Alabama's legislature, state legislators developed a plan for redistricting based on the decennial census data. J.S. App. 5. The data revealed that many of the existing districts were significantly malapportioned, requiring their boundaries to be redrawn in order to comply with constitutional requirements of equal apportionment. In particular, the 2010 census showed that 80 of the State's 105 House districts and 24 of the State's 35 Senate districts deviated from an equal population standard by more than 5 percent. *Id.* at 17-19. The malapportionment was particularly severe in Alabama's majority-black districts, all of which were underpopulated. *Id.* at 18-19. Indeed, nine of the 27 majority-black House districts and two of the eight majority-black Senate districts were underpopulated by more than 20%. *Ibid.* This malapportionment reflected both population shifts since the last census and the fact that the State's prior districting plans—adopted when both Houses of the legislature were controlled by Democrats—had generally underpopu-

lated majority-black districts and overpopulated nearby majority-white districts. *Id.* at 20; see *id.* at 15-17.

Alabama's legislature retained a consultant to draw district lines in accordance with principles the legislature established. The legislature determined that no district's population should exceed that of any other district by more than two percent. See J.S. App. 27-28. This rule required closer adherence to a "one person, one vote" standard than prior plans, which had permitted district populations to vary by as much as ten percent. *Ibid.*

The legislature also required that "districts be drawn in accordance with the [VRA], be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest." J.S. App. 27. In cases of conflict between objectives, the legislature designated the top priorities to be compliance with "one person, one vote" rules and compliance with the VRA. *Id.* at 27-28. The legislators with principal roles in the redistricting process and the legislature's consultant understood Section 5 of the VRA to prohibit the "reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as compared to the 2001 districts." *Id.* at 33.

The State's final redistricting plans contained the same number of majority-black districts as the State's prior plans. Most of those districts retained approximately the same percentage of black residents. See J.S. App. 47, 53. In some, the match was quite precise: 13 of the 27 majority-black House districts and three of the eight majority-black Senate districts came within one percentage point of maintaining the

same percentage of black residents. *Id.* at 228 (Thompson, J., dissenting); see *id.* at 47. House Districts 52 and 55—with total populations of just over 45,000—came within 2 and 12 black residents, respectively, of achieving an identical percentage of black residents. *Id.* at 208 (Thompson, J., dissenting). Other majority-black districts, however, saw significant changes in their ethnic composition, with the percentage of black residents in seven majority-black House districts and four majority-black Senate districts either increasing or decreasing by more than five percent. See Alabama Legislative Black Caucus Br. 5a-7a.

In repopulating the majority-black districts, the plans moved over 120,000 black residents into majority-black House districts and over 106,000 black residents into majority-black Senate districts. J.S. App. 195-197 (Thompson, J., dissenting). These figures represented, respectively, 19.7 percent and 15.8 percent of the State's black residents who did not already reside in majority-black districts for the legislative branch at issue. *Ibid.*

In largely party-line votes, both the House and Senate redistricting plans were enacted in May 2012. J.S. App. 58-59.

Because Alabama was covered by Section 5 of the VRA at the time of the plans' enactment, the plans were submitted to the Attorney General for preclearance. After analyzing the plans to determine whether they had the purpose or effect of denying or abridging the right to vote as proscribed by Section 5, see *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470 (Feb. 9,

2011) (2011 Guidance), the Attorney General interposed no objection to the plans. J.S. App. 8.[1]

3. Appellants brought suit to challenge the redistricting plans. One suit was brought by the Alabama Legislative Black Caucus, an organization of African-American state legislators, along with several individual plaintiffs. 13-895 J.S. ii; J.S. App. 8. A second suit was brought by the Alabama Democratic Conference, an African-American political organization, joined by several individual plaintiffs. 13-1138 J.S. ii; J.S. App. 9. Each suit alleged, among other claims, that Alabama's redistricting plans drew district lines based predominantly on race, in violation of the Equal Protection Clause. See J.S. App. 13-14.

4. a. Following a bench trial, a three-judge district court rejected appellants' challenges, including their claims under the Equal Protection Clause. The court construed each of the lawsuits as alleging that the redistricting plans "as a whole constitute racial gerrymanders," and it understood the Democratic Conference appellants to also challenge four particular Senate districts on that ground. J.S. App. 128.

In addressing appellants' equal protection claims, the district court turned first to standing. It noted that a plaintiff bringing a racial gerrymandering claim must generally show that he or she resides in the district being challenged. J.S. App. 135-136. Applying this rule, it found that the Democratic Conference appellants lacked standing because they had not of-

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[1] Consistent with Section 5 of the VRA and accompanying regulations, the Attorney General did not consider whether the plans violated any statutory or constitutional provision other than Section 5, such as Section 2 of the VRA or the Equal Protection Clause. See 2011 Guidance 7470.

fered evidence that organization members resided in any of the challenged districts. *Id.* at 138. The court concluded, however, that the Black Caucus appellants had standing to challenge the redistricting plans because the Black Caucus—which is "composed of every African-American member of the [Alabama] House and Senate"—has members in all majority-black districts in the State. *Id.* at 136 (citation omitted).

Turning to the merits, the district court rejected appellants' equal protection challenges on the ground that "[r]ace was not the predominant motivating factor" for the redistricting "[a]cts as a whole." J.S. App. 140. The court reasoned that the legislature had sought to balance a number of objectives, including adhering to the State's equal-population requirements; complying with the VRA; protecting incumbents; and preserving communities of interest. *Id.* at 146-147. Race did not predominate among these objectives, the court concluded, because "the constitutional requirement of one person, one vote trumped every other districting principle." *Id.* at 151; see also *id.* at 147-152. The court further concluded that evidence that the legislature had generally "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible" demonstrated that the legislature "was not predominantly motivated by racial considerations." *Id.* at 144. The court also noted that in some districts the black population had dropped substantially, indicating that the legislature had not prioritized maintaining the percentage of black residents above all other objectives. *Id.* at 154.

Although the district court had found the Democratic Conference appellants lacked standing, it conducted a district-by-district analysis of the four Senate districts that were the focus of the Democratic Conference challenge, only one of which was a majority-black district. The court found that race did not predominate with respect to those districts because population equality, partisan objectives, and protection of incumbents best explained the changes to those districts. See J.S. App. 166-173.

The district court also concluded that even if race had been the predominant factor in Alabama's redistricting plans, the use of race had been permissible because it was narrowly tailored to serve the compelling interest of compliance with Section 5 of the VRA. J.S. App. 173-174. The court explained that race had been used only to "preserve[], where feasible, the existing majority-black districts and maintain[] the relative percentages of black voters in those majority-black districts." *Id.* at 181-182. The court understood each of these objectives to be required by Section 5 of the VRA. *Id.* at 183. Because it found any use of race justified under Section 5, the court did not address Alabama's further contention that the State's use of race was justified to comply with Section 2 of the VRA.

b. Judge Thompson dissented. J.S. App. 188-275. Judge Thompson found substantial evidence that race had predominated in drawing at least a significant number of Alabama's majority-black districts. He emphasized that the legislators chiefly responsible for the redistricting had prioritized maintaining the same percentage of black voters in each majority-black district for the stated purpose of complying with Sec-

tion 5—a goal he described as maintaining "racial quotas." See *id.* at 192-194, 213-216. He noted that several districts came within a few individuals of the number needed to maintain the same percentage of black residents as existed under the prior redistricting plans. *Id.* at 230; see *id.* at 208.

Judge Thompson wrote that this level of precision required extraordinary measures. For example, malapportionment required a substantial repopulation of Senate District 26. Despite what Judge Thompson described as the "racially mixed demographics of the areas" surrounding the district, J.S. App. 239, of the 15,785 people added to the district, 14,806 were black, and only 36 were white, *id.* at 201. Judge Thompson also pointed to evidence that the legislature had disregarded certain incumbent preferences, moved certain districts, and split precincts. *Id.* at 232-243. Judge Thompson found the splitting of precincts particularly indicative of a "racial methodology," because data was available at the census block level for race but not for political affiliation, so that when the consultant split a "'massive' number of precincts," he "could not have done so based on how many Democrats or Republicans lived in each census block" but must have looked instead to "racial data." *Id.* at 234.

While acknowledging that not every majority-black district retained the same percentage of black residents, Judge Thompson concluded that the evidence of race-based gerrymandering required "an individual assessment for each district as [to] whether race was a predominant factor" in drawing the district's boundaries. J.S. App. 227.

Judge Thompson also dissented from the majority's conclusion that Section 5 of the VRA had justified any

use of race as a predominant factor in Alabama's redistricting. That view, he argued, misunderstood the VRA. Rather than barring every redistricting change which reduces the proportion of minority voters in a district, Judge Thompson wrote, Section 5 barred only changes that functionally diminished the ability of minority groups to elect their candidates of choice. J.S. App. 253-261. He also concluded that Alabama could not rely on Section 5 to justify its redistricting plans because, after the redistricting plans were enacted, this Court invalidated the coverage formula that had made Alabama subject to Section 5. *Id.* at 267-269 (discussing *Shelby County*). Like the majority, Judge Thompson did not address whether any use of race was justified to comply with Section 2 of the VRA.

SUMMARY OF ARGUMENT

The district court misconstrued the Equal Protection Clause and the VRA when it upheld Alabama's 2012 redistricting plans in their entirety. The court's decision should be vacated, and the case should be remanded for the fact-intensive district-by-district analysis necessary to determine whether race predominated in the drawing of particular district lines and, if so, whether that use of race was narrowly tailored to comply with the VRA.

I. The district court made fundamental mistakes in analyzing whether Alabama used race as a predominant consideration in drawing legislative districts.

A. The district court erred in assessing only whether race was the predominant factor in Alabama's redistricting plans "as a whole," rather than performing a district-by-district analysis. When race is the "predominant factor" motivating a legislature to place

a significant number of residents inside any single legislative district, unless that use of race satisfies strict scrutiny, the voters within that district suffer a constitutional injury, even if race does not play a significant role in defining other districts within the State. Accordingly, courts must analyze whether traditional districting principles were subordinated to race in drawing particular districts—not just whether race predominated in a plan as a whole.

B. The district court further erred in concluding that race could not have predominated in Alabama's redistricting because Alabama prioritized compliance with the requirement of "one person, one vote" over other districting principles. The constitutional requirement that districts have approximately equal populations is a background rule that applies in every redistricting. Even if all the State's districts are of equal size, race predominates if race was used in disregard of traditional districting principles to determine which residents to allocate to particular districts.

C. Determining whether race predominated in drawing those districts that are properly challenged in the appellants' suits requires an analysis of each challenged district to assess the roles of race and of other considerations in drawing boundaries. Here, evidence suggests that race may have predominated in drawing some districts. Key legislators appear to have prioritized maintaining the same percentage of black residents in majority-black districts as had existed in the prior redistricting plans. And the precision with which the legislature achieved that objective strongly suggests an overreliance on race. Nevertheless, a remand is appropriate so that the district court may in the first instance make the fact-intensive determina-

tion of whether these results were achieved in disregard of traditional districting principles in individual districts.

II. The district court's alternative conclusion that any use of racial classifications in Alabama's plans satisfied strict scrutiny should also be vacated, because it rests on a misunderstanding of Section 5 of the VRA.

A. Contrary to the district court's view, Section 5 does not bar every districting change that reduces the percentage of minorities in a majority-minority district. Section 5 prohibits only changes that diminish a minority group's existing ability to elect a candidate of choice. The court therefore erred in concluding that Section 5 justified Alabama's effort to maintain the same percentage of black voters in each majority-black district, without analysis of whether that step was a narrowly tailored means of protecting black voters' ability to elect their candidates of choice in those districts.

B. 1. This Court's precedents counsel in favor of permitting the district court to determine, in the first instance, whether use of race in Alabama's redistricting would have been narrowly tailored to satisfy strict scrutiny, assuming that compliance with Sections 2 and 5 of the VRA constitutes a compelling interest. Adherence to that approach is particularly appropriate here because proceedings in the district court may obviate the need to decide whether Alabama can invoke Section 5 to justify its 2012 redistricting plans in the wake of *Shelby County*.

2. If this Court elects to address the strength of Alabama's interest in complying with the VRA before any remand, it should decide that at the time of Ala-

bama's 2012 redistricting, the narrowly tailored use of race to comply with Sections 2 and 5 of the VRA could satisfy strict scrutiny, notwithstanding the Court's subsequent decision in *Shelby County*. The strict scrutiny standard affords States some leeway to use narrowly tailored racial classifications when a strong basis in evidence supports the view that the classification is necessary to serve a compelling state interest. When the Alabama legislature enacted its redistricting plans in 2012, strong evidence supported its conclusion that compliance with Section 5 required that race be taken into account in drawing some district boundaries. And even apart from Section 5, strong evidence supported the conclusion that Section 2 required that race be taken into account.

3. On remand, the district court should determine whether race predominated over traditional districting principles in any of the challenged Alabama districts, and if so, whether that use of race was narrowly tailored to achieve compliance with the VRA. At least for some districts, it is questionable whether the State had a strong basis in evidence to believe that Section 5 required maintaining the same percentage of black voters as existed in the prior redistricting plan. But a determination of whether Alabama could properly use race as a predominant consideration in drawing any of the challenged districts will require resolution of open disputes of fact. The court will need to make findings regarding the population levels needed to preserve black voters' ability to elect their candidates of choice and concerning whether traditional districting principles were subordinated more than was necessary to achieve compliance with the VRA in particular dis-

tricts. These questions are appropriately resolved in the first instance by the district court on remand.

ARGUMENT

I. THE DISTRICT COURT FAILED TO PROPERLY DETERMINE WHETHER RACE PREDOMINATED IN DRAWING THE BOUNDARIES OF APPELLANTS' LEGISLATIVE DISTRICTS

The district court's judgment should be vacated because the court did not properly determine whether traditional districting principles were subordinated to race in drawing Alabama's districts. First, the court failed to undertake the required inquiry into whether race predominated in drawing the lines of the particular districts that the appellants had standing to challenge, instead determining that race did not predominate in the redistricting plans as a whole. Second, the court erred in concluding that race did not predominate because the legislature prioritized the creation of districts of approximately equal population over consideration of race. Here, evidence in the record indicates that race may have predominated in the drawing of at least some districts. Nevertheless, because a proper analysis of the challenged districts will require a fact-intensive review typically performed by district courts in the first instance, the case should be remanded.

A. The District Court Erred By Failing To Determine Whether Race Was The Predominant Consideration In Setting The Boundaries Of Individual Districts

The district court erred when it assessed the appellants' equal protection claims by determining whether race was the predominant factor motivating the drafting of the redistricting plans "as a whole." See, *e.g.*,

J.S. App. 128, 140. An equal protection violation occurs when "race was the predominant factor motivating the legislature's decision to place a significant number of voters *within or without a particular district*," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995) (emphasis added), whether or not race was the predominant factor for an entire statewide plan. Accordingly, when confronted with challenges to the use of race in redistricting, a court "must scrutinize *each challenged district* to determine whether * * * race predominated over legitimate districting considerations." *Bush* v. *Vera*, 517 U.S. 952, 963 (1996) (plurality opinion) (emphasis added). This Court has performed these district-by-district assessments even in the presence of evidence that the plan drafters had overarching statewide goals relating to race. See *id.* at 965-975; see also, *e.g.*, *Miller*, 515 U.S. at 917; *Shaw* v. *Hunt*, 517 U.S. 899, 904-907 (1996) (*Shaw II*); *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999).

This district-by-district analysis is dictated by the nature of the constitutional harm at issue. When a voter is placed in a particular district drawn predominantly based on race, absent a narrowly tailored compelling interest, the voter suffers "fundamental injury" from governmental "racial classification." *Shaw II*, 517 U.S. at 908 (quoting *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661 (1987)); see also *Vera*, 517 U.S. at 957 (plurality opinion) (describing *Shaw* harm as being "personally * * * subjected to [a] racial classification"). The voter also suffers a "representational harm[]," *United States* v. *Hays*, 515 U.S. 737, 747 (1995), because legislators elected in districts drawn along racial lines "are more likely to believe that their primary obligation is to represent only the members

of" a particular racial group, "rather than the constituency as a whole," *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*). A voter in a district drawn based predominantly on race suffers these injuries whether or not race was used so pervasively in *other* districts that race predominated in the plan as a whole.

An analysis of whether race predominates in a plan "as a whole" is overbroad, as well, because it enables plaintiffs to challenge districts in which they do not themselves reside. When plaintiffs live in a district where race has predominated over traditional districting principles, they "have standing to challenge that part of" the redistricting plan, *Shaw II*, 517 U.S. at 904, because they have "been denied equal treatment because of the legislature's reliance on racial criteria." *Hays*, 515 U.S. at 745. Permitting challenges to a plan "in its entirety," however, would enable plaintiffs to challenge district lines that cause the plaintiffs themselves no cognizable injury, because "where a plaintiff does not live in" a district drawn along racial lines, "he or she does not suffer those special harms" that confer standing. *Id.* at 745-746; see also *Sinkfield* v. *Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam) (rejecting "[a]ppellees' suggestion * * * that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts").

This Court has adhered to a district-by-district approach even in prior cases in which there has been direct evidence of statewide race-related objectives. See *Vera*, 517 U.S. at 960-961, 970 (plurality opinion) (case involving "substantial direct evidence of the legislature's racial motivations" including explicit dec-

larations of intent to maximize the number of black majority districts); *Miller*, 515 U.S. at 910 (case where evidence of race-based districting was "practically stipulated by the parties") (citation omitted). That approach remains sound. It reflects the constraints of standing. And it ensures accurate adjudication, because while the record contains evidence that the legislature maintained the same percentage of black residents in certain majority-black districts in possible disregard of traditional districting principles, see, *e.g.*, J.S. App. 231-234 (Thompson, J., dissenting), legislators did not maintain the same percentage of black voters in every majority-black district, see *id.* at 227-228 (Thompson, J., dissenting). Thus, as the dissent below recognized, *id.* at 227, district-by-district review is appropriate to determine whether race predominated in the particular districts that the appellants have standing to challenge.

B. The District Court Erred By Concluding That Race Could Not Predominate If The Legislature Drew Districts Containing Approximately Equal Populations

The district court also erred in concluding that race could not have predominated in Alabama's drawing of district lines simply because "the constitutional requirement of one person, one vote trumped every other districting principle" in the 2012 redistricting. J.S. App. 151; see also *id.* at 147-148, 170.

That reasoning cannot be squared with this Court's decisions. The constitutional requirement that legislative seats "be apportioned on a population basis," *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964), trumps other districting objectives in *every* decennial redistricting—including each redistricting at issue in this Court's prior cases concerning race-based gerryman-

dering. See, *e.g.*, *Miller*, 515 U.S. at 920; *Vera*, 517 U.S. at 976 (plurality opinion); *Shaw II*, 517 U.S. at 906. Yet none of those cases treated compliance with one person, one vote as determinative of whether race predominated in the plans before the Court. Instead, the critical question was whether race had been placed above traditional districting considerations in determining *which* persons were placed in appropriately apportioned districts. See, *e.g.*, *Miller*, 515 U.S. at 916 (explaining that "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations"); *Shaw I*, 509 U.S. at 647. And several cases affirmed that race *did* predominate despite the absence of any suggestion that the States had failed in their obligation to draw districts "as nearly of equal population as is practicable," *Sims*, 377 U.S. at 577. See *Miller*, 515 U.S. at 917-920; *Shaw II*, 517 U.S. at 906-907. In sum, this Court's cases establish that race predominates over traditional districting principles if it is the primary criterion used in determining which citizens to allocate to a particular district—irrespective of whether that district was appropriately apportioned.

The district court's departure from this approach would fail to protect against the harms of unconstitutional racial classifications. This Court has explained that the "central purpose" of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race," *Shaw I*, 509 U.S. at 642, and voters are harmed if race predominates in drawing the districts in which

voters are placed without compelling and narrowly tailored justification. Yet the district court's rule would permit States to use race predominantly without justification, so long as they established districts of equal size. The district court's misapprehension of the framework for determining whether race predominates in a redistricting requires the district court's conclusion that race did not predominate in Alabama's redistricting to be vacated.

C. This Case Should Be Remanded For Application Of This Court's Precedents

A determination of whether race predominated in individual districts requires fact-intensive analysis that is best performed by the district court in the first instance. The record below contains evidence suggesting that race did predominate in the drawing of some majority-black districts. Key legislators regarded the maintenance of existing black population percentages in majority-black districts as necessary to comply with Section 5. See J.S. App. 27-28. For some districts, that objective was achieved with extraordinary precision. See *id.* at 208 (Thompson, J., dissenting) (noting districts within 2, 12, and 13 individuals of maintaining the same percentage of black voters). In addition, voters were moved into some districts in a manner that seemed guided by race: For example, in one district, only 36 out of 15,785 voters added to correct malapportionment were white. *Id.* at 201 (Thompson, J., dissenting). Further, the record contains evidence that suggests traditional districting principles were sometimes set aside. See *id.* at 231-234 (Thompson, J., dissenting). Analysis of the evidence concerning each district is nevertheless required because some majority-black districts deviated

significantly from the goal of maintaining the same percentage of black residents, see *id.* at 154, and because in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles. Cf. *id.* at 144 (noting evidence the legislature had generally "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible").

This Court's cases suggest that the better course is for the district court to engage in the fact-intensive application of equal protection principles to particular districts in the first instance. See *Shaw I*, 509 U.S. at 658 (articulating governing legal framework and then remanding case to district court for initial application); cf. *Cromartie*, 526 U.S. at 553-554 ("[W]e are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations."). The Court should vacate the district court's opinion and remand for a district-by-district basis assessment of whether race predominated in the districts subject to challenge.

II. THE DISTRICT COURT ERRED IN ITS STRICT SCRUTINY ANALYSIS BECAUSE IT MISUNDERSTOOD THE REQUIREMENTS OF THE VOTING RIGHTS ACT

The district court concluded that, in the alternative, any use by Alabama of race as a predominant consideration in redistricting was justified under strict scrutiny, because it served the compelling interest of complying with the VRA. As explained below

(pp. 28-34, *infra*), compliance with both Section 2 and Section 5 of the VRA was a compelling governmental interest when Alabama adopted its 2012 redistricting plans. But the district court's conclusion that Alabama's use of race was required to comply with Section 5 misreads that provision, and the court failed to conduct any analysis of whether Alabama's use of race was required to comply with Section 2. The appropriate course under these circumstances is to remand the case for determination in the first instance of whether Alabama's use of race in any specific districts in which race predominated over traditional districting considerations was narrowly tailored to comply with the VRA.

A. The District Court's Strict Scrutiny Analysis Rested On A Misunderstanding Of The Voting Rights Act

The district court's strict scrutiny analysis should be vacated, because it rested on a mistaken understanding of Section 5. In particular, the district court was incorrect to conclude that Section 5 required the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans. Section 5 does not impose a categorical bar on "substantially reduc[ing] the relative percentages of black voters" in existing majority-black districts, see J.S. App. 183, much less does it require the precise maintenance of those relative percentages. Thus, assuming compliance with Section 5 would be a compelling interest, see pp. 28-34, *infra*, the district court's analysis does not support the conclusion that the challenged districts were a narrowly tailored means of advancing that interest.

Section 5 prohibits only those diminutions of a minority group's proportionate strength that strip the

group within a district of its existing ability to elect its candidates of choice. This Court has explained that Section 5's objective "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Section 5 achieves this result by foreclosing districting changes that diminish minorities' ability to "elect their choices" of candidates. *Ibid.* (citation omitted) (describing inquiry as "whether the ability of minority groups to participate in the political process *and to elect their choices to office* is augmented, diminished, or not affected" by an electoral change) (emphasis added; prior emphasis omitted) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)); *Vera*, 517 U.S. at 983 (plurality opinion) (describing Section 5 as "mandat[ing] that the minority's *opportunity* to elect representatives of its choice not be diminished"). In construing this standard, the Court has rejected the view that Section 5 bars every change that reduces the minority population in a majority-minority district. See *City of Richmond* v. *United States*, 422 U.S. 358, 370-372 (1975) (rejecting Section 5 challenge to annexation plan that decreased the percentage of black voters within city in light of changed method of election).

Although the district court viewed 2006 amendments to the VRA as altering this standard to prohibit any reduction in the percentage of minorities in majority-minority districts, the 2006 amendments did not have this effect. Congress amended the relevant portion of Section 5 after this Court in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), departed from the abil-

ity-to-elect standard, concluding that instead "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice" in determining whether an electoral change was retrogressive. *Id.* at 480. Congress disapproved of this decision, see Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 578, and reinstituted the ability-to-elect standard by providing that a voting practice "abridges the right to vote" if it "will have the effect of diminishing the ability of any citizens of the United States on account of race or color * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b); see also 42 U.S.C. 1973c(d) (stating that added provision's purpose "is to protect the ability of such citizens to elect their preferred candidates of choice"). Because these revisions simply reinstituted the standard in effect prior to *Ashcroft*, they did not impose a standard—without any precedent in the pre-*Ashcroft* era—that bars any reduction of the percentage of minority voters in a majority-minority district. Indeed, leading proponents of those amendments explicitly disavowed such a reading. See, *e.g.* 152 Cong. Rec. 15,318 (2006) (statement of Sen. Leahy) (reducing the number of minorities in a district is perfectly consistent with * * * Section 5 as long as other factors demonstrate that minorities retain their ability to elect their preferred candidates"); *id.* at 15,322 (statement of Sen. Feingold) (concurring with Sen. Leahy).

Even if the statutory text were ambiguous, the district court's interpretation of Section 5 would be untenable. First, it is "implausible" that Congress

aimed to compel the maintenance of minority populations well above the level needed to elect a candidate of choice. See J.S. App. 253 (Thompson, J., dissenting). Such a rule would require the preservation of districts akin to the "packed" districts historically created to undercut minority groups' political participation. See, *e.g.*, *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994) (describing "packing"); *Shaw I*, 509 U.S. at 640 (describing "concentrating" black voters during Reconstruction). In addition, by requiring heightened consciousness of race in redistricting even when unnecessary to preserve the political stature of minority communities, such a rule might raise constitutional questions. Cf. *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 446 (2006) (*LULAC*) (opinion of Kennedy, J.) (noting that a reading of statute that "would unnecessarily infuse race into virtually every redistricting" would "rais[e] serious constitutional questions").

The district court believed that its view was consistent with the interpretation of Section 5 adopted by the Department of Justice (DOJ). J.S. App. 183; see also *id.* at 100, 149, 175. The district court, however, was mistaken. DOJ has issued guidance explaining that in determining "whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General *does not rely on any predetermined or fixed demographic percentages* at any point in the assessment." 2011 Guidance 7471 (emphasis added). Instead, the guidance calls for a functional analysis of whether a proposed plan continues a minority group's ability to elect. That approach encompasses not only consideration of population statistics but also consideration of "voting patterns

within the jurisdiction, voter registration and turnout information, and other similar information." *Ibid.* DOJ's position is longstanding. See *Texas* v. *United States*, 831 F. Supp. 2d 244, 265 n.26 (D.D.C. 2011) (noting consistency of DOJ guidance); see also *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).[2] Because the district court's strict scrutiny analysis rested on an erroneous construction of Alabama's statutory obligations, it must be vacated.

B. This Case Should Be Remanded For An Appropriate Strict Scrutiny Analysis

1. This Court's precedents indicate that the appropriate course in light of the district court's error is to allow the district court to determine in the first instance, using a correct construction of the VRA, whether any predominant use of race in Alabama's districting was narrowly tailored to serve a compelling governmental interest. See *Shaw I*, 509 U.S. at 658 (remanding case for analysis of questions including whether consideration of race was justified based on

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[2] The Attorney General's decision not to interpose objections to Alabama's redistricting plans does not suggest that Alabama was correct in its understanding that maintenance of certain percentages of black voters in majority-black districts was required by Section 5. In reviewing plans under Section 5, DOJ's review is limited to whether a proposal results in retrogressive effect or reflects a discriminatory purpose prohibited by Section 5. Preclearance accordingly does not constitute a determination that changes in a districting plan were *necessary* to comply with Section 5. Nor does preclearance constitute "certification that the voting change satisfies any other requirement of the law beyond that of [S]ection 5," 28 C.F.R. 51.49, including other parts of the VRA or constitutional provisions. 2011 Guidance 7470.

the VRA without first deciding whether VRA compliance was compelling interest); see also *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming but not deciding that VRA compliance was compelling interest); *Shaw II*, 517 U.S. at 915 (same).

Adherence to that approach is particularly appropriate here. Although the dissenting judge concluded that Alabama lacked a compelling interest in complying with Section 5 of the VRA in light of this Court's *Shelby County* decision, proceedings on remand may clarify that an appropriate disposition of this case will not require a resolution of that question. There will be no need to reach that question unless the district court on remand first concludes that race did predominate over traditional districting criteria in the drawing of any of the challenged districts. Even then, there will be no need to reach the question unless the district court concludes that the State had a strong basis in the evidence to believe that Section 5—properly construed—required the State to maintain the particular percentages of black voters it maintained in those districts. If the composition of the districts cannot be justified as narrowly tailored under a correct understanding of Section 5, then the districts will be invalid whether or not the State's reliance on Section 5 would have provided a compelling interest sufficient to justify appropriately drawn districts.

Indeed, the status of Section 5 for redistricting plans based on the 2010 census will only be relevant if the State would have lacked a strong basis in evidence to believe that Section 2 required the same result as Section 5. To establish a violation of Section 2, a plaintiff must show that a minority group "is sufficiently large and geographically compact to constitute

a majority in a single member district"; that the minority group is "politically cohesive"; and that the majority "votes sufficiently as a bloc to enable it * * * to defeat the minority's preferred candidate." *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986); see also *Growe* v. *Emison*, 507 U.S. 25, 40-41 (1993). If a plaintiff establishes these conditions, a court considers whether, under "the totality of the circumstances," members of the minority group have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." *Abrams*, 521 U.S. at 91 (quoting 42 U.S.C. 1973(b)). Because the districts alleged to have been racially gerrymandered in this case were all majority-minority districts and there was evidence of both minority group cohesiveness and racial bloc voting, there is a substantial chance that the obligations of Section 2 and Section 5 in Alabama's redistricting are coextensive. These circumstances counsel in favor of adherence to the Court's prior approach of reserving judgment concerning compliance with the VRA as a compelling interest.

2. a. If the Court elects to consider at this stage whether, at the time of Alabama's redistricting, strict scrutiny permitted the narrowly tailored consideration of race to comply with the VRA, the Court should answer in the affirmative. The strict scrutiny standard allows States to employ racial classifications that are narrowly tailored to achieve compelling interests. See, *e.g.*, *Shaw I*, 509 U.S. at 642. To meet this standard, a State must show that it had "a strong basis in evidence" to conclude that the use of race was necessary to serve a compelling interest. *Shaw II*, 517 U.S. at 908 n.4; *Shaw I*, 509 U.S. at 656; *LULAC*, 548 U.S.

at 519 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *Ricci* v. *DeStefano*, 557 U.S. 557, 585 (2009) (applying strong-basis-in-evidence standard in Title VII context).

The "strong basis in evidence" standard gives States some margin of safety in determining whether the use of race is needed to comply with a statutory mandate or other compelling objective. While the "strong basis in evidence" requirement demands more than legislators' good-faith belief that the use of race is justified, see *Ricci*, 557 U.S. at 563, it does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid, see *id.* at 580-581; *Vera*, 517 U.S. at 977 (plurality opinion). Legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance. See *Ricci*, 557 U.S. at 582-583 (contrasting standard requiring "a provable, actual violation" of statute in absence of racial classification with "strong basis in evidence" standard). Because constitutional and statutory duties "are not always harmonious," *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion), a more rigorous standard would "'trap[]" public officials "between the competing hazards of liability'" for failing to comply with a statute on the one hand, or violating the Constitution, on the other, *Vera*, 517 U.S. at 977 (plurality opinion) (citation omitted).

b. When Alabama enacted its 2012 redistricting statute, Alabama had a strong basis in evidence for its conclusion that it had a compelling interest in consid-

ering race to avoid a violation of the VRA. This Court has assumed that States have a compelling interest in avoiding a violation of Section 2. See, *e.g.*, *Abrams*, 521 U.S. at 91; *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 978 (plurality opinion); see also *id.* at 990 (O'Connor, J. concurring). That assumption is unaffected by this Court's decision in *Shelby County*. And with respect to Section 5, in *LULAC*, eight Justices agreed that compliance with that provision was a compelling state interest, reflecting that if compliance with a statute that had been upheld as a valid exercise of federal power did not constitute a "compelling state interest[]" for constitutional purposes, States would be placed "in the impossible position of having to choose between compliance with [federal law] and compliance with the Equal Protection Clause." 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); see also *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.).

Appellants do not here dispute that compliance with Section 2 and Section 5 of the VRA could be a compelling state interest for Alabama, but the dissent below concluded that compliance with Section 5 of the VRA could not be because, after Alabama passed its redistricting plan in 2012, this Court held that the existing coverage formula in Section 4(b) of the VRA could not be used as a basis for making Section 5 mandatory for any State. See *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612 (2013).

This view misunderstands the nature of compelling interest analysis. As noted above, for Alabama to have been justified in complying with Section 5 in its redistricting, Alabama needed only a "strong basis in evidence" for the conclusion that doing so was required to serve the compelling interest of compliance with federal law. See *Ricci*, 557 U.S. at 582-583; cf. *Vera*, 517 U.S. at 977 (plurality opinion) ("If the state has a 'strong basis in evidence,' for concluding that creation of a majority-minority district is reasonably necessary to comply with" the VRA "and the districting that is based on race 'substantially addresses' the VRA violation, it satisfies strict scrutiny.") (citation omitted). This standard does not demand Alabama's compliance with Section 5 to have "in fact" been legally required. See *Ricci*, 557 U.S. at 580.

Alabama had the requisite "strong basis in evidence" to believe that Section 4 required it to comply with Section 5, notwithstanding this Court's later decision in *Shelby County*. Section 4—which made compliance with Section 5 mandatory for Alabama—was "presumed constitutional" as an Act of Congress. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (citing *Fairbank* v. *United States*, 181 U.S. 283, 285 (1901)). Further, both Sections 4 and 5 had been repeatedly upheld by this Court. See, *e.g.*, *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-333 (1966). And after the VRA was reauthorized by large majorities of both houses of Congress in 2006, all courts, until this Court's decision in *Shelby County*, again upheld the relevant provisions. See *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), rev'd, 133 S. Ct. 2612 (2013);

Northwest Austin Mun. Util. Dist. No. One v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge court), rev'd on other grounds, 557 U.S. 193 (2009). The presumption of constitutionality of federal statutes, and the long history of decisions upholding the relevant portions of the VRA, provided Alabama with a strong basis in evidence to conclude that compliance with Section 5 was required.

A contrary holding would place States in the impossible bind that this Court sought to avoid when it adopted the "strong basis in evidence" standard. States engaged in core sovereign functions would be required to strike precisely the balance that a court would ultimately strike years later in balancing "not always harmonious" constitutional and statutory mandates—with the certainty of a constitutional or statutory violation if they guessed wrong. See *Wygant*, 476 U.S. at 277 (plurality opinion). This Court has rejected the argument that strict scrutiny requires "the States 'to get things just right'" in this way. *Vera*, 517 U.S. at 978 (plurality opinion) (citation omitted). Rather, consistent with the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan" this Court has explained that in implementing the strict-scrutiny standard, "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, [Section] 2 liability." *Ibid.*

A requirement that States "get things just right" in balancing statutory and constitutional obligations would be particularly problematic in the districting context, because redistricting is a core state function. See, *e.g.*, *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975). Because "[f]ederal-court review of districting legisla-

tion represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, see also, *e.g.*, *LULAC*, 548 U.S. at 414-415 (plurality opinion); *Abrams*, 521 U.S. at 101, it is appropriate that constitutional standards give States some leeway to reasonably reconcile constitutional and statutory mandates, see *McDaniel* v. *Sanchez*, 452 U.S. 130, 138-139 (1981) (explaining greater flexibility accorded to legislatures than courts in implementing guarantee of "one-person, one-vote").

In addition, strong reliance interests are at stake. This Court has recognized that in determining when redistricting is required, the interests protected by the Equal Protection Clause must be balanced against citizens' interests in political stability. Thus, while the Equal Protection Clause requires that legislative districts be equally apportioned, States are not required to draw such districts more than once per census period, *Sims*, 377 U.S. at 577, because of the "need for stability and continuity in the organization of the legislative system," *id.* at 583; see also *LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (describing legal fiction that plans are constitutionally apportioned through the decade as "a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability"). The same balancing counsels against requiring mid-decade redistricting changes based on the change in the law brought about by *Shelby County*. Such a requirement would undermine the "stability and continuity" of state governance in the 16 States that adopted districting plans in compliance with Section 5 following the 2010 census, see *Status of Statewide Redistricting Plans*, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last

visited Aug. 14, 2014), in addition to the thousands of covered local jurisdictions.

3. To satisfy strict scrutiny, any use of race as a predominant consideration in drawing the boundaries of legislative districts must be narrowly tailored. See, *e.g.*, *Vera*, 517 U.S. at 977 (plurality opinion); *Miller*, 515 U.S. at 920. Use of race is narrowly tailored to achieve compliance with the VRA if it "substantially addresses" a reasonably perceived statutory violation, *Vera*, 517 U.S. at 977 (plurality opinion) (quoting *Shaw II*, 517 U.S. at 918), and does not "subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid" the violation, *id.* at 979.

This case should be remanded for application of the narrow tailoring standard, because application of the standard here requires the resolution of factual questions that the district court did not decide. Most notably, because Section 2 and Section 5 constrain only electoral practices that deny or abridge the ability of minority voters to elect their candidates of choice, a narrow tailoring analysis requires resolving disputed questions concerning the population levels needed to preserve black voters' ability to elect candidates of choice. See J.S. App. 106-107, 164-165 (describing conflicting evidence regarding necessary population levels in Alabama before the district court). At least some of Alabama's majority-black districts were sustained at a higher population level than appears to be supported by the ability-to-elect evidence presented below. See J.S. App. 47-48 (noting districts with black populations in excess of 70 percent). Nonetheless, it is appropriate for the district court to determine in the first instance whether the use of race as a predomi-

nant consideration in drawing any particular district's lines was a narrowly tailored means of complying with the VRA.

CONCLUSION

The district court's decision should be vacated, and this case should be remanded for further consideration.

Respectfully submitted.

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AUGUST 2014

AMICUS CURIAE BRIEF

13-895, 13-1138

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

—v.—

ALABAMA, *et al.*,

Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,

Appellants,

—v.—

ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including by, among other things, working to preserve and protect the right to vote for every eligible citizen.

The consolidated cases before the Court pose important questions about the Equal Protection Clause, the Voting Rights Act, and use of race in redistricting. In the hope that it will be of assistance in analyzing the complex issues before the Court, the Brennan Center respectfully submits brief amicus curiae.

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[1] The appellants and appellees have filed blanket letters of consent to amicus briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or the submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

Alabama violated constitutional principles because it established a strict racial quota when drawing district lines without first undertaking any factual inquiry as to community or remedial needs.

While *Shaw v. Reno*, 509 U.S. 630 (1993), and the racial gerrymandering line of cases ordinarily require that courts engage in a complicated analysis to determine whether race was the primary consideration in a redistricting effort, that step is not necessary here because Alabama concedes that its overriding goal, as it equalized the population of districts across the state, was to make sure it maintained the same percentage of African Americans in each majority-minority district that previously existed. The only question then is whether those racial quotas were permissible to enable Alabama to meet an appropriate governmental interest. They were not.

Alabama's constitutional error was not its use of racial population targets in the redistricting process but rather its adoption of mechanistic racial population quotas without first undertaking an appropriate analysis to determine that those numbers were, in fact, related to permissible goals, like complying with the Voting Rights Act or adhering to traditional redistricting principles. Alabama claims that it was motivated by the need to comply with Section 5 of the Voting Rights Act. But instead of undertaking a particularized factual analysis, based on current circumstances, to determine what district lines and population targets were in fact needed to ensure that its plan did not

result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), as contemplated by Section 5, Alabama used racial population quotas as both the starting and ending point of its inquiry. This Court has long treated superficial racial quotas with skepticism in the affirmative-action context, and the same concerns apply here. Without a factual analysis, it is impossible to determine whether the state's use of race served the remedial and prophylactic goals of the Voting Rights Act or masked more invidious goals. A mechanistic quota, simply put, is not the sort of tool the Constitution permits states to use to ensure compliance with Section 5.

Moreover, Alabama fundamentally misconstrued and perverted the mandates of Section 5. Both the courts and the Department of Justice have long rejected mechanistic racial population quotas under Section 5 in favor of a more nuanced and multi-factor factual inquiry. Rather than advancing the goals of Section 5, mechanical quotas threaten to undermine them by enabling "packing" of minority voters and other techniques to undermine their ability to elect the representatives of their choice and failing to take into account changes in facts and circumstances. This Court's Section 2 jurisprudence, while not directly at issue in this case, supports the need for a nuanced factual inquiry when applying race-based remedies in the redistricting context.

Because Alabama did not engage in such a nuanced factual inquiry before applying its racial population quotas, its redistricting plan is constitutionally tainted and should be voided. Requiring Alabama to redraw its districts using a correct interpretation of Section 5 will serve not only the mandates of the Equal Protection Clause, but will advance and ensure accountability on sensitive issues at the intersection of race and politics that deserve the legislature's accurate and unfettered consideration and judgment.

ARGUMENT

I. Alabama's Racial Quotas, Adopted Without Any Factual Analysis, Are Constitutionally Suspect

Alabama's 2011 redistricting plans were born of a flawed premise: That the state's "new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census" in order to avoid "retrogression" under Section 5 of the Voting Rights Act. *Alabama Legislative Black Caucus, et al., v. Alabama, et al.*, 989 F. Supp. 2d 1227, 1247 (M.D. Ala. 2013). This poorly constructed rule, adopted without any research or investigation (factual or legal)[2] into whether the numerical racial population numbers reflected current needs or realities, badly misconstrues the state's responsibilities under Section 5.

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[2] *See* Brief of Appellants Alabama Democratic Caucus ("ADC Br."), et al., *Alabama Democratic Caucus, et al., v. Alabama, et al.*, No. 13-113 (August, 13, 2014), at 5-12.

Instead of assessing the actual ability of African-American voters to elect representatives of their choice or considering other redistricting criteria or indicia of community, Alabama legislators required mapdrawers to use predetermined racial population quotas. In doing so, they forced the mapdrawers to take extraordinary steps, over the objections of minority lawmakers, to meet those goals. This kind of unthinking racial quota, divorced from any analysis as to remedial or prophylactic needs, is constitutionally suspect under any standard of review. *See Romer v. Evans*, 517 U.S. 618, 635 (1996) ("A status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.").

The problem in this case is not that Alabama considered race when it undertook its 2011 redistricting or that it drew majority-minority districts or even that race was a significant consideration guiding the shape that districts took. None of those things would have taken Alabama's maps beyond the constitutional pale if they were done to recognize natural communities or to remedy or prevent discrimination. In fact, it would be strange for a mapdrawer to fail to take into account the existence of racial and ethnic communities, especially where the daily experience of minority groups continues – progress notwithstanding – to be heavily impacted by race.[3] Those communities are

[3] In places like New York City, for example, it is not hard to find issues like de facto school segregation, stop-and-frisk policies,

real, and the redistricting process rightly takes them into account.

But this Court has cautioned it is possible to go too far in defining district lines by race. *See Miller v. Johnson,* 515 U.S. 900, 919 (1995) (finding that the "evidence was compelling 'that there are no tangible "communities of interest"' spanning the hundreds of miles" between distinct African-American communities that had been forced together). Minorities in a rural part of a state might have very different experiences, needs, and worldviews than members of the same minority group who live in heavily urbanized areas.

When a jurisdiction, like Alabama, adopts racial population targets without any investigation to make sure that the numeric goals actually reflect current realities and are actually tailored to serve an appropriate government interest, such as remedying or preventing discrimination, it offends the Constitution for at least three reasons. First, the jurisdiction engages in a naked form of racial stereotyping. Second, it risks failing to take into account the evolution of society, including changing voting patterns, communities, and polarization levels. Third, it risks compelling the packing of minorities into supermajority districts when such districts are no longer necessary to ensure fair representation and when such districts might even

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and instances of alleged excessive force by police that mean that members of distinct ethnic groups often have a strong sense of shared community forged along racial and ethnic lines. The same is true in other parts of the country.

undermine the interests of the communities they purport to benefit.

It is for similar reasons that this Court has consistently regarded racial quotas with deep suspicion. More than 35 years ago, for example, in *Bakke*, this Court held unconstitutional a medical school admissions policy that set aside a certain number of slots for members of minority groups, likening the numerical set-aside to a "prefer[ence] for members of one group 'for no other reason than race or ethnic origin.'" *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978). More recently, the Court struck down an affirmative-action program at the University of Michigan that automatically awarded points to applicants from certain minority groups. *Gratz v. Bollinger*, 539 U.S. 244 (2003). Although all prospective Michigan students also could receive points for other non-race based criteria, the Court found the Michigan program "problematic" because, as far as the race-related points were concerned, "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Id.* at 271-72.

While the Court's affirmative-action cases take place in a different context, their basic teaching that bare racial quotas are constitutionally suspect and thus need to be justified is applicable here. To overcome constitutional doubts about such racial classifications, it is not enough for the state to invoke a permissible governmental object. The state must also show that it engaged in a careful, deliberative

process to ensure that its race-based decision was actually calibrated serve its legitimate interest. *Romer v. Evans*, 517 U.S. at 635 (classification must bear a factual connection to the legitimate interest it purports to serve). Here, there is no question that Alabama engaged in no factual analysis whatsoever to determine whether its racial classification bore a factual connection to its interest in complying with the Voting Rights Act.

A requirement that the state engage in some sort of factual analysis before applying racial population targets is necessary to ensure that that those targets are in fact designed to achieve their stated purpose and not an invidious purpose. As the Court explained in *Shaw*, a "reapportionment plan would not be . . . tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655. There is no question, for example, that legislatures rightly would be barred by the Fourteenth Amendment from adopting a 99% population quota for African-American districts, though such districts conceivably might not result in retrogression.[4]

Although Alabama did not adopt a 99% quota, what it did is similarly troubling. It drew district lines without regard to the concerns of (and, in some cases, with opposition from) the very people it was purporting to protect and without any consideration

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[4] Although it is conceivable that a 99% African-American district could pass muster under Section 5, such a district almost certainly would raise significant questions about packing and discriminatory purpose.

of whether the districts it drew would serve the interests of the Voting Rights Act. J.A. at 93. Absent an appropriate analysis that takes into account current facts on the ground, its racial population targets are simply unjustified racial quotas.

II. Alabama's Racial Quotas Cannot be Justified by the State's Interest in Complying With Section 5 of The Voting Rights Act

Alabama cannot overcome the constitutional suspicions that attach to its quotas by asserting that it only did what it did because it needed to obtain approval for its redistricting plans under Section 5 of the Voting Rights Act. J.A. at 29-31, 96-96.

To be sure, compliance with the Voting Rights Act has long been treated by courts as a compelling interest. *Shaw v. Reno*, 509 U.S. at 654 ("States certainly have a very strong interest in complying with federal antidiscrimination laws."). However, that does not mean covered jurisdictions have free rein to adopt superficial racial quotas unconnected with the facts on the ground and without regard for what Section 5 actually requires.

A. *The Justice Department and Courts Have Rejected Alabama's Approach*

Not surprisingly, both courts and the Department of Justice have rejected Alabama's cramped interpretation of Section 5. As explained in guidance to Section 5 compliance issued by the Justice Department in February 2011:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a *functional analysis* of electoral behavior within the particular jurisdiction or election district.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Dep't. of Justice Feb. 9, 2011) (emphasis added).

This position is not a new one. As the court in recent litigation over Texas's newest maps explained, the Department's 2011 guidance is "consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades." *Texas v. United States*, 831 F. Supp. 2d 244, 265 & n.26 (D.D.C. 2011) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Indeed, in the Justice Department's 1987 guidance on application of Section 5, the Department noted that many covered jurisdictions had urged it to adopt a retrogression standard that could be "applied to submitted changes in a fairly mechanical way." *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486-501 (Dep't. of Justice Jan. 6, 1987). But the Department declined to do so because a "Section 5 determination [that] is . . . based on the appraisal of a complex set of facts [does] not readily fit a precise formula for resolving the

preclearance issues." *Id.*; *see also Hearing Before the House and Senate Special Interim Comms. On Redistricting*, 76th Leg., Tape 2, p. 15 (Feb. 16, 2000) (statement of Gaye Tenoso) (cautioning the Texas Legislature "against using magic numbers, 65 percent say" to gauge whether a majority-minority district was effective).

This Court, likewise, has acknowledged the complexity of the retrogression analysis required by Section 5 and eschewed predetermined numeric population benchmarks. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 428 (2006) (observing that "it may be possible for a citizen-age majority to lack real electoral opportunity" despite its numeric majority); *see also Georgia v. Ashcroft*, 539 U.S. 461, 498 (2003) (Souter, J., dissenting) (agreeing with the majority that "the simple fact of a decrease in black voting age population . . . in some districts is not alone dispositive about whether a proposed plan is retrogressive"). As the District Court for the District of Columbia explained, "[t]he legal standard [under Section 5] is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a magic parameter." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 79 (D.D.C. 2002) (three-judge court), *vacated on other grounds*, 539 U.S. 461 (2003) (citing *Johnson v. De Gandy*, 512 U.S. 997, 1017 n.14) (1994).

More recently, federal courts in both Texas and Florida have rejected mechanical racial population quotas in the redistricting context. In

Texas, the three-judge court considering requests to preclear Texas's legislative and congressional maps firmly declined to adopt the bright-line test proposed by Texas, holding:

> [P]opulation demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.

Texas v. United States, 831 F. Supp. 2d at 262 (citing *LULAC v. Perry*, 548 U.S. at 428). The Florida Supreme Court construing analogous non-retrogression provisions in the Florida state constitution, likewise, concluded:

> Because a minority group's ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision. . . . To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment.

In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 626-27 (Fla. 2012).

Consistent with this long understanding and practice, the Justice Department has precleared many plans in which the percentages of minorities in districts fell. *See* ADC Br. at 28-31. In the case before the Court, the district court majority below was simply wrong when it concluded that Alabama "chose the only option available" when it decided, without investigation, to keep the population of African-American districts at historic levels. J.A. at 181.

B. *Alabama's Racial Quotas Have Real Potential to Be Inconsistent With the Underlying Goals of Section 5*

In adopting its broad-brush racial quota untethered to any fact findings, Alabama turned a blind eye to at least three very real potential harms for minority communities and society at large.

1. Undermining Minority Political Gains

First, Alabama's superficial interpretation of Section 5 would permit states to use the guise of Voting Rights Act compliance to keep the populations of majority-minority districts fixed even as society continues to evolve. Thus, as population shifts, a jurisdiction that healed long-standing divisions and overcame discrimination might be required to draw increasingly awkward districts based unnecessarily on race.

The potential injury to minority communities is very real and goes beyond mere electoral outcomes. Where minority communities have been able to overcome or ameliorate the effects of discrimination to have their voices heard and their needs addressed, it would be remarkable to interpret Section 5 to mechanically require those gains to be undone simply to advance a quota.

Although it arises in a different context, the experience of Maverick County, Texas in the recent round of Texas redistricting illustrates how easily hard fought progress can be jeopardized. Maverick County is an isolated, overwhelmingly Hispanic county, located along the Texas-Mexico border, and "is among 'the poorest counties in the United States.'" *Texas v. United States*, 887 F. Supp. 2d 133, 209 (D.D.C. 2012) (appendix). Nonetheless, "despite their relative poverty, the citizens of Maverick County [had become] educated about the electoral process" and, through organization and a united front in voting, had found electoral dignity and "finally seen some . . . change come about." *Id.* at 209-210 (quoting trial testimony of Maverick County Judge David Saucedo). However, when it came time to draw congressional districts, Texas split the small county between two sprawling districts, making it harder for the county's Hispanic community to organize effectively to fight for things like four-year universities and veterans clinics. *Id.*

By mechanically prioritizing fulfilling the quota over all else, Alabama's quotas risk compelling similar stark results under the guise of enforcing the

Voting Rights Act. That would both fail to recognize progress and might undermine it.

2. Risk of a False Retrogression Choice

Redistricting quotas also create a tension between majority-minority districts and "ability to elect" districts that are independently protected under Section 5 even if they are not majority-minority districts.

Although much of the argument in this case centers on Alabama's treatment of the state's majority African-American districts, it is important to bear in mind that Section 5 is not limited to majority-minority districts. Rather, a district, even if it has a minority citizen voting-age population of less than 50%, may be protected by Section 5 from retrogression if minorities in the district have proven the "ability to elect" candidates of their choice. In many places in the country, courts have found that African Americans have the ability to elect when they constitute as little as 38.37% of the population. *Pender Cnty. v. Bartlett*, 649 S.E. 2d 364, 367 (N.C. 2007) ("Past election results in North Carolina demonstrate that a legislative voting district with a total African–American population of at least 41.54 percent, or an African–American voting age population of at least 38.37 percent, creates an opportunity to elect African–American candidates."); *see also Texas v. United States*, 831 F. Supp. 2d at 263 & n.24 (noting that even Texas's proposed bright-line "ability to elect" standard assumed African Americans in that state have the ability to elect when they make up 40% of a district's citizen voting age population).

The mechanical quotas advocated by Alabama risk creating a false choice between preserving such less than 50% ability to elect districts and cannibalizing their minority population to make sure majority-minority districts have a demographic supermajority, whether needed or not. In other words, Alabama's quota approach absurdly forces legislatures into having to consider retrogression in order to meet the quota. It would be hard to find a situation more at odds with the very purpose of Section 5.

Alabama's approach, in fact, may invite calculated efforts by legislators to short circuit the healthy and natural emergence of such minority influence just as it starts to become a reality. That is precisely what parties challenging South Carolina's 2011 legislative maps contend happened in that state. As one African-American state representative in South Carolina recounted in sworn testimony:

> As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a 'D' by a candidate's name knows that the candidate is an African-American candidate. . . . Then he chuckled and said, 'Well now, South Carolina will

> soon be black and white. Isn't that brilliant?'

Affidavit of the Honorable Mia Butler Garrick para. 16, *Backus v. South Carolina,* Case No. 3:11-cv-03120 (D.S.C. Feb. 22, 2012) (Doc. 147). It is hard to imagine more demeaning treatment of a community.

3. Creation of Non-Performing Districts

With existing Section 5 ability to elect districts, Alabama's approach also opens the door to a third, opposite danger – namely that districts created using quotas might underperform and no longer allow minorities to elect their community's candidates of choice, even if on paper the district's demographics look the same (or better). This is because election results are influenced by many things other than racial demographics. While districts might appear from a superficial demographic perspective as if they would allow minorities to elect candidates of their choice, a host of issues, including "minority voter registration and minority voter turnout," could impact the real-world likelihood that redrawn districts actually preserve minority electoral gains. *Texas v. United States*, 831 F. Supp. 2d at 264. For that very reason, the three-judge panel considering preclearance of Texas's 2011 legislative and congressional maps found that Texas fell short when it relied on a demographics-only approach to determine whether a district provided minorities with the "ability to elect." *Id.* Rather, as the district court admonished, "Given its history, Texas cannot overlook education and employment levels affecting minority electoral participation and remnants of historic discrimination that may

continue to affect voting in some areas of the State." *Id.* As the court explained, many factors are relevant to the "complex" retrogression analysis:

> We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate.

Id. at 264-65.

The 2011 Texas preclearance case is instructive both on why a demographics-only approach does not work and why there is an inherent risk of manipulation in that approach. In one Texas congressional district, the court found that mapdrawers had "tried to make the district more Republican – and consequently, less dependable for minority-preferred candidates – without changing the district's Hispanic population levels." *Texas v. United States*, 871 F. Supp. 2d 133, 155 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). To do this, the Texas mapdrawers had engaged in a sleight of hand that "replaced many of the district's active Hispanic voters with low-turnout voters in an effort to strengthen that voting

power of [the district's] Anglo citizens." *Id.* The result was "enough to 'nudge' a district that was an ability [to elect] district, but barely so, to a non-performing one." *Id.* Viewing the maps with the more nuanced analysis that Section 5 requires, the court found several examples of retrogression that would not have been captured by the mechanical approach used by Texas:

> Several districts in the proposed plans show that population statistics alone rarely gauge the strength of minority voting power with accuracy. For example, . . . Congressional District 23 and House District 117 were selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas. Such districts might pass a retrogression analysis under Texas's population demographics test . . . , even though they were engineered to decrease minority voting power.

Texas v. United States, 887 F. Supp. 2d at 140 n.5.

In this case, the flaw was not that Alabama adopted a numeric racial population target, or even that it was a rigid one, but that it did so in a vacuum without any kind of investigation or consideration of community concerns, electoral representation, or performance factors which would more carefully safeguard the hard fought gains of minority communities. What Alabama did was a cartoon version and mockery of what Section 5 actually requires.

C. *Invalidating the Tainted Maps Will Promote Legislative Accountability*

By adopting racial quotas based on an erroneous interpretation of federal law, Alabama prevented its legislature from considering the full range of options before it. Acknowledging that African Americans in many places may no longer need supermajority districts would have allowed the Alabama legislature greater flexibility in giving force to other "traditional redistricting principles" such as keeping school districts, towns, and other natural and political boundaries together – issues that the record reflects were important to the very African-American community that the quotas in this case ostensibly were designed to serve. *See* Brief of Appellants Alabama Legislative Black Caucus, et al., *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, No 13-895 (August 13, 2014), at 16.

Invalidating the redistricting map and instructing Alabama to draw new districts without the use of rigid artificial racial quotas would further accountability. It would allow Alabama officials to draw constitutionally permissible districts without the distorting influence of an incorrect assumption about the requirements of federal law. In the same way, this Court analogously has reversed and remanded cases where state Supreme Courts have construed a state constitution in harmony with what it erroneously believes a parallel federal constitutional provision requires. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam); *Ohio v. Johnson*, 467 U.S. 497, n. 7 (1984);

South Dakota v. Neville, 459 U.S. 553 (1983); *Michigan v. Long*, 463 U.S. 1032 (1983).

Redistricting requires important and sensitive decisions concerning the intersection of race, partisan politics, and constitutional law. The weighty issues involved deserve the legislature's accurate and unfettered consideration and judgment. The Alabama lawmakers should be permitted to make these decisions with an accurate understanding of their lawful options and obligations under federal statutory and constitutional law.

Vacating and remanding to the Alabama legislators would also serve as a prophylactic measure against the invocation of federal law as a pretext for improperly motivated decisions regarding race and partisan politics. This would further benefit the democratic process by allowing Alabama voters to pass judgment on their representatives with a correct understanding of the allocation of responsibility. Voters should be allowed to understand the actual constraints and options facing their elected representatives, particularly on such a critical democratic issue as redistricting. Alabama officials should be accountable to informed voters, and not able to falsely blame federal law for their decisions.

III. The Court's Section 2 Jurisprudence Shows How a Factual Analysis Helps Avoid the Pitfalls of Alabama's Approach

Both the Constitution and Section 5 require a factual analysis before adopting racial population targets in a redistricting context.

Although this Court has had limited opportunity to elaborate on the contours of that analysis under Section 5, it has set forth a detailed inquiry for determining when majority-minority districts are required as a remedy for vote dilution under Section 2 of the Voting Rights Act. While the legal standards under Section 2 and Section 5 are different, the Court's careful, fact-driven approach in Section 2 cases shows how a nuanced factual inquiry can be used to assess race discrimination issues in the redistricting context while avoiding the constitutional morass in which it finds itself.

In Section 2 cases, this Court laid out three necessary factual preconditions for the need to create new majority-minority districts:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). These factors – now commonly known as the "*Gingles* factors" – are not the end of the inquiry. *Id.* at 79. If they are satisfied, the trier of fact then still must

"consider the 'totality of circumstances' and determine, based 'upon a searching practical evaluation of the "past and present reality,"' whether the political process is equally open to minority voters." *Id.* (citations omitted). Justice Brennan, writing for the Court in *Gingles*, explained, "This determination is peculiarly dependent on the facts of each case and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* The factors the Court found relevant under the "totality of circumstances" included findings of "racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice," which "acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and elect candidates of their choice." *Id.* at 80.

Throughout its Section 2 jurisprudence the Court has stressed that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). A nuanced factual inquiry ensures that the Voting Rights Act is sensitive to changed factual circumstances and that its remedies will not be invoked inappropriately. Indeed, in *Johnson v. De Gandy*, this Court expressly rejected Florida's argument that a jurisdiction enjoyed a "safe harbor" from review if it created minority-controlled seats in proportion to a minority group's share of the total population because such a rule would "promote and

perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. 997, 1019-20 (1994). Instead, the Court explained:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Id. at 1020.

What distinguishes Section 2 vote dilution cases from Alabama's vision of Section 5 is that the former is fact based. As society and circumstances change, so will the degree to which Section 2 comes into play. If, for example, the day comes when a community in Alabama (or elsewhere) no longer experiences racially polarized voting, then the need to draw a majority-minority district also will cease.

Likewise, if a minority community becomes spread out because of an end to residential segregation, then it may become impossible to draw a compact district in which a minority community comprises more than 50% of the population. In other words, Section 2, as interpreted by this Court, has a number of built-in safeguards that ensure that consideration of race in redistricting has a case-by-case application and expiration date. This is in keeping with what this Court has stressed is the role of such districts as "remedial devices." *De Grandy*, 512 U.S. at 1020.

Although Section 2 is not at issue in this case, this Court's jurisprudence on Section 2 is instructive on what more carefully constructed efforts to comply with Section 5 could look like. Regardless of the details of the factual inquiry needed to determine what district lines and racial population targets were needed to prevent "retrogression" under Section 5, the Constitution required that Alabama undertake such an inquiry. Alabama did not do so, and so it should be required to redraw its maps using an appropriate analysis.

CONCLUSION

For the above reasons, the decision of the three-judge court for the United States District Court for Middle District of Alabama should be reversed and remanded.

Respectfully submitted,

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Dated: August 20, 2014

AMICUS CURIAE BRIEF

Nos. 13-895, 13-1138

In The

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

On Appeals from the United States District Court
For the Middle District of Alabama

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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August 20, 2014

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g., Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of amicus briefs.

SUMMARY OF ARGUMENT

These appeals raise serious questions of racial gerrymandering under *Shaw v. Reno*, 509 U.S. 630 (1993), and the misuse of federal civil rights protections, specifically Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, with respect to Alabama's 2012 state legislative redistricting plans.

For the reasons set forth below, neither appeal is in an adequate posture for this Court to either reverse or affirm. The judgments of the District Court dismissing the Appellants' *Shaw* claims should be vacated, and these appeals should be remanded to the District Court for reconsideration under the proper legal standards. On remand, the District Court may elect to reopen the record to permit the plaintiffs and the defendants to supplement the record with the benefit of this Court's guidance.

The District Court committed at least three significant legal errors that require *vacatur* of its finding that race was not the predominant motive for any district under *Miller v. Johnson,* 515 U.S. 900 (1995).

First, the District Court failed to conduct a district-specific analysis with respect to several crucial categories of evidence presented by the Appellants, including racially-imbalanced precinct splits, county splits and population swaps. The District Court unjustifiably confined its review of district-specific data to aggregate statistics, and

failed to assess the Appellants' evidence of racial gerrymandering district-by-district.

Second, the District Court treated the State's 2001 redistricting plans as a safe harbor for the 2012 redistricting. However, current conditions in Alabama should have been the touchstone of its review. The District Court thus erred by requiring the Appellants to demonstrate that conditions had materially changed relative to 2001.

Third, the District Court uncritically accepted the State's 2% population deviation target as an across-the-board non-racial explanation for the Appellants' substantial evidence of specific district boundaries that departed from traditional districting principles. The District Court erred by failing to consider whether alternative district boundaries could have met the State's 2% population deviation while avoiding racially-imbalanced precinct splits, county splits and population swaps.

Due to these legal errors, the District Court's factual findings on predominant motivation are inadequate for plenary review here.

On the other hand, the Court should decline the Appellants' invitation to bypass the standards for triggering strict scrutiny set forth in *Miller v. Johnson*, *supra*. The Appellants rest their claims upon Alabama's 2012 redistricting goal of keeping the black voting-age population percentages in each of the pre-existing majority-black state house and senate districts undiminished. While the Appellants

have identified several instances in which those district boundaries appear to have been distorted for racial reasons, they cast a much broader net, arguing that strict scrutiny is triggered for both redistricting plans as a whole on the basis of the State's redistricting criteria alone.

Such a generalized equal protection claim would represent a substantial, unnecessary and infeasible expansion of the current workable standards for assessing predominant motivation under *Miller*. *See United States v. Hays*, 515 U.S. 737, 746-747 (1995). The Court's *Shaw* jurisprudence to date has pointedly been conducted on a district-specific basis, including the requirements for plaintiffs' standing, the alleged harms and the remedies.

It is particularly important for this Court to consider how difficult it would be to translate a finding of liability on this record into an effective and judicially-efficient remedy. As the record now stands, the District Court would have few if any parameters to inform the remedial proceedings. The generalized theories of liability advocated by the Appellants provide no standards to distinguish constitutional from unconstitutional districts in a redrawn plan. The serious and potentially wide-reaching effects of a remedy in this case warrant a remand to make adequate findings for the essential purposes of clarifying the grounds for liability and effectuating a just remedy.

Finally, the status of Section 5 of the Voting Rights Act presents a dilemma. The Court's general jurisprudence strongly suggests that the decision in

Shelby County v. Holder, *supra*, vitiated any Section 5 compliance interest for post-2006 voting changes in Alabama, although the Court could fashion an exception in recognition of States' general reliance interests. To the extent that the Court finds that Section 5 can constitute a potentially compelling interest in this case, the District Court's contingent analysis of the standards for preclearance under Section 5 of the Voting Rights Act, which accepted Alabama's reading of those standards wholesale, was patently erroneous as a matter of law.

ARGUMENT

I. THE DISTRICT COURT MUST REWEIGH THE EVIDENCE UNDER THIS COURT'S ESTABLISHED LEGAL STANDARDS FOR DETERMINING WHETHER AN ELECTION DISTRICT IS A RACIAL CLASSIFICATION

A. This Court Applies a Well-Understood Analysis Under *Shaw v. Reno* to Decide Whether a Challenged Election District is a Racial Classification Subject to Strict Scrutiny

Claims of racial gerrymandering under *Shaw v. Reno*, *supra*, are "analytically distinct" because they are not based upon vote dilution principles, but rather involve an excessive emphasis upon racial considerations in redrawing election districts. *Shaw v. Reno*, 509 U.S. at 652. *Shaw* recognized that redistricting decision-makers routinely and unavoidably are aware of the racial consequences of their districting choices and that constitutional

concerns are not triggered by an awareness of race. *Id.* at 642.

Miller v. Johnson, *supra*, set out what is by now a well-understood analysis for identifying districts that require a compelling interest and narrow tailoring to be upheld. That analysis clearly distinguishes routine considerations of race from situations in which racial considerations have distorted the redistricting process:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

> particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, 515 U.S. at 916, *quoting Shaw v. Reno*, 509 U.S. at 647 (internal citations omitted).

Shaw claims are tightly focused upon the bounding choices affecting specific districts. This Court never has applied strict scrutiny solely upon a State's decision to achieve a particular racial percentage within a particular district. Neither awareness of racial demographics, nor irregular shape, nor split political subdivisions is sufficient alone to trigger strict scrutiny. *See Shaw v. Reno*, 509 U.S. at 633-634 (12th Congressional District in North Carolina); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Easley v. Cromartie*, 532 U.S. 234 (2001) (same); *United States v. Hays*, 515 U.S. at 741-742 (2nd and 4th Congressional Districts in Louisiana); *Miller v. Johnson*, *supra* (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Bush v. Vera*, 517 U.S. 952 (1996) (18th, 29th and 30th Congressional Districts in Texas). *See*

also King v. Illinois State Bd. of Elections, 522 U.S. 1087 (1998) (summarily affirming three judge court decision concerning 4th Congressional District in Illinois).

Since the decision in *Easley v. Cromartie* in 2001, this Court has not had occasion to decide further *Shaw* claims, largely because the *Miller* standards are well-understood and have been followed.

B. The District Court Applied Erroneous Legal Standards in Concluding that the Challenged Election Districts are not Racial Classifications

The District Court ruled that "[r]ace was not the predominant motivating factor for the Acts as a whole. And race was not the predominant motivating factor for drawing Senate Districts 7, 11, 22, or 26." J.S. App. at 140.[2] Although the District Court did find that "race was a factor in the creation of the districts," it found that "the Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations."[3] *Id.* at 143.

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[2] "J.S. App." refers to the Appendix attached to the ALBC Appellants' Jurisdictional Statement.

[3] The District Court rejected all of the plaintiffs' racial gerrymandering claims by finding that none of them met the threshold burden of establishing that the Legislature subordinated race-neutral traditional districting principles to race. J.S. App. at 140-173 (relying, *inter alia*, on *Bush v. Vera*, 517 U.S. at 964-965 (only when race is the predominant factor motivating the legislature's redistricting decision will strict scrutiny apply.)) Although the majority acknowledged that race was a factor in the creation of the districts, it concluded that

Because the District Court committed several serious errors of law that jeopardized the validity of these findings and its ultimate disposition of the Appellants' claims, its judgments should not be affirmed. The case should be remanded to the District Court for reconsideration under correct legal standards.

1. The principal flaw in the District Court's analysis is that it failed at critical junctures to conduct a district-specific analysis of the Plaintiffs' evidence. To be sure, the District Court did provide some discussion of individual challenged districts. *See, e.g.*, J.S. App. at 36-43, 166-173. However, this was largely confined to describing aggregate population shifts and overall district populations.

The Appellants provide persuasive examples of the District Court's failure to properly analyze evidence of racially-disparate precinct splits and racially-disparate county splits. *See, e.g.*, ADC Br. at 12-19; ALBC Br. at 12-13, 41-54.

The District Court's legal analysis of the split-precinct evidence was further marred by its treatment of the Voting Rights Act considerations as being non-racial in nature. The District Court asserted that Mr. Hinaman's "testimony confirms

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racial considerations were not the predominate motivation and, instead, "one person, one vote trumped every other redistricting principle." J.S. App. at 151-152. The majority found that Mr. Hinaman, the consultant who drew the redistricting maps for the Republican majority in the Legislature, "balanced and satisfied five lawful objectives with respect to the majority-black districts in the plan." *Id.* at 146-147.

that race was not the predominant motivating factor in precinct splitting." J.S. App. at 159.

However, the District Court immediately followed that assertion with the statement that "where it occurred, precinct splitting was less of an evil to be avoided in redistricting than the subordination of other redistricting criteria, such as compliance with the Constitution and the Voting Rights Act." *Id.* The District Court thus appears to have reasoned that precinct splitting was a lesser evil than failing to comply with the Voting Rights Act. That may – once strict scrutiny review is complete – prove to be correct. But for purposes of a predominant motivation analysis, it represents a critical concession by the District Court that "where it occurred" in the challenged plans, the precinct splitting was racial in nature.

This confusion of Voting Rights Act compliance with non-racial factors is shown by the District Court's supporting citation to *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004) (stating that traditional districting principles "*of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest*" were secondary to ensuring compliance with the Constitution and the Voting Rights Act) (emphasis in original).

The District Court's error is further confirmed by its subsequent supporting citation to the Department of Justice's "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act," 76 Fed. Reg. 7470-01 (Feb. 9, 2011) (explaining that

"compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain redistricting criteria," such as precinct splitting, "to avoid retrogression"). J.S. App. at 159.

Compliance with the Voting Rights Act, as properly interpreted, is a compelling state interest, but it is racial in nature. The Voting Rights Act in some circumstances properly can require a jurisdiction to make a limited departure from strict adherence to certain traditional redistricting criteria such as precinct splitting, but that departure is decidedly not non-racial in nature. The District Court thus erred as a matter of law by finding that the State's professed VRA compliance provided a non-racial explanation for precinct splitting "where it occurred."

It is possible that the county and precinct splitting in the challenged plans can be attributed to non-racial objectives. It is equally if not more plausible, however, that these were predominantly attributable to the objective of achieving specific racial population thresholds. If that is the case, then strict scrutiny is implicated under *Miller*. A substantial portion of this Court's opinion in *Cromartie* involved parsing just this type of evidence to determine whether the district court had correctly inferred the State's motivations in distinguishing racially-driven precinct splits from partisan-driven precinct splits. *Easley v. Cromartie*, 532 U.S. at 244-257.

The Appellants also explain how the District Court overlooked other strong evidence of racial boundary manipulations in Senate Districts 25 and 26. ALBC Br. at 49-54; ADC Br. at 12-15.

The District Court's failure to review highly-relevant district-specific evidence of boundary manipulations and other departures from traditional districting principles represented a fundamental analytic error that prevented the District Court from making critical factual findings, and may well have altered the District Court's ultimate conclusions about whether any of the challenged districts were racial classifications. These errors warrant the appeals to be remanded for further fact-finding under the correct legal standards.

2. The District Court erroneously treated the State's 2001 redistricting decisions as representing the baseline for constitutional compliance while fundamentally disregarding current conditions.[4] Specifically, the District Court treated the 2001 Plans, which were upheld in *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), as setting the standard for the plaintiffs' claims of racial gerrymandering, which were based upon current conditions. This is illustrated in the following passage:

> We refuse to apply a double standard that requires the Legislature to follow one set of

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[4] The majority concluded that the plaintiffs had not offered any "credible evidence that the percentages of the black population in the majority-black districts adopted in 2001 were no longer warranted." J.S. App. at 163-164.

> rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it. After the 2000 Census, nothing changed that would have relaxed the constitutional and statutory standards that governed redistricting. On the contrary, in 2006, Congress amended section 5 of the Voting Rights Act to make the standard for retrogression 'more stringent.' *Shelby Cnty.*, 133 S. Ct. at 2617. And in *Larios*, a three-judge district court in this Circuit expressed concern that an overall deviation in population of 10 percent was no longer a "safe harbor" for purposes of the one person, one vote command of the Equal Protection Clause, particularly in the light of developing technology that makes it possible to achieve substantially greater population equality. *At trial, the plaintiffs offered no credible evidence that the percentages of the black population in the majority-black districts adopted only ten years earlier were no longer warranted.*

J.S. App. at 163-164 (emphasis added).

It is axiomatic that current conditions must be the focus for equal protection claims. On remand the District Court should be instructed to give primary weight to current conditions in Alabama.

3. The District Court also erroneously reviewed the State's 2% deviation guideline.

The second prong of the District Court's stated rationale for finding that race was not a predominant

motivation was its assertion that majority-black districts were underpopulated based upon the State's 2% population deviation criterion. J.S. App. at 151-152, 158. This begs the question, however, because it can neither prove nor disprove that any district's boundaries trumped traditional districting considerations for racial reasons.

The Appellants argue that the State could have added nearby majority-white areas to underpopulated majority-black districts, but that overwhelmingly-black areas were added instead in order to maintain specific racial percentages. ALBC Br. at 49-53; ADC Br. at 12-19. This is an argument with teeth. If such changes were done in derogation of traditional districting principles, then *Miller* calls for strict scrutiny.

Notwithstanding what appear to be very specific racially imbalanced boundary changes in the record, the District Court failed to make any finding as to whether these boundary changes were the unavoidable consequence of achieving a 2% deviation. Nor did the District Court make any finding as to whether these boundary changes departed from traditional districting principles.

Specifically, the Appellants point to districts in which overwhelmingly black areas were reassigned to districts that would have remained majority-black even if all of the new population was white. These racially imbalanced population transfers may nominally have been done in service of a 2% deviation, but that does not prove that such transfers were necessary. The Appellants contend that

racially-balanced alternatives were available, ADC Br. at 16-17, 34-35; ALBC Br. at 10, and that some of these districts included racially imbalanced split precincts. ALBC Br. at 46-49; ADC Br. at 12-14.

The District Court thus erred because it gave decisive weight to the generic goal of bringing the underpopulated majority-black districts into one-person one-vote compliance, without considering whether more racially balanced transfers were possible. The District Court then compounded that error by failing to consider the district-specific evidence of racially imbalanced population transfers.

This is an issue of causation and predominant motivation, not narrow tailoring. To illustrate, assume that the State constructed a district using a series of precincts split along racial lines, and that it placed the overwhelmingly black portions of those split precincts within the hypothetical district. If a 2% deviation was unattainable but for that series of split precincts, then the 2% goal has legitimate power as a non-racial explanation. On the other hand, if the 2% goal was attainable without employing such racially imbalanced departures from traditional districting principles, then the 2% goal explains nothing and the *Miller* standard for predominant motivation would be implicated.

This general failure of the District Court's analysis requires reconsideration of the record. On remand, before crediting the State's 2% deviation goal as providing a non-racial explanation for racially imbalanced splits of precincts or counties, the District Court must find that more balanced

population reassignments were not reasonably feasible. On the other hand, if the District Court finds that more-balanced population swaps were reasonably feasible and would have better comported with traditional districting principles, then strict scrutiny is directly implicated.

C. Both Appellants' Theories of Liability Unnecessarily Depart from the Workable *Miller v. Johnson* Formulation

These appeals do not require the Court to expand the circumstances under which an election district must be subjected to strict scrutiny as a racial classification. Both Appellants seek to shortcut the Court's established standards for delimiting presumptively unconstitutional racial classifications from routine election districts, but neither Appellant has set forth a workable decision rule.[5]

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[5] The majority found that only the Alabama Legislative Black Caucus plaintiffs had standing to bring their racial gerrymandering claim. J.S. App. at 134-140. The majority concluded that the Alabama Legislative Black Caucus had standing because it established that its members resided in nearly every challenged district, the parties stipulated that the Alabama Legislative Black Caucus was "composed of every African-American member of the House and Senate," and the Caucus represented voters whose rights to equal protection of the law would be violated by redistricting plans that constituted a racial gerrymander. The Court determined the Alabama Democratic Conference did not have standing because it failed to clearly establish in the record which districts its members resided in based on the new district lines and failed to establish that its members were classified by race in the redistricting plans. *Id.* 134-140.

1. The Appellants expend little effort arguing that the District Court was clearly erroneous with respect to specific districts.[6] Instead, the Appellants propose new constitutional formulations under which entire redistricting plans – not merely individual districts – may be challenged as presumptively unconstitutional racial classifications. The Appellants present somewhat differing theories for reaching strict scrutiny, but neither theory provides a persuasive basis to reverse the District Court.

The ALBC Appellants argue that "[b]ecause race was the predominant motivating factor in the redrawing of the majority-black districts, the state must establish that the redistricting plan satisfied strict scrutiny." ALBC Br. at 54.

The ADC Appellants explicitly reject the rule of standing announced in *United States v. Hays*, *supra*,[7] arguing that "this case involves a constitutional challenge not to the design of any one specific district, but to a statewide policy applied directly in every black-majority district," ADC Br. at 57, and reiterate that "[h]ere, plaintiffs challenge not one district in isolation, but a statewide policy, applied

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[6] The ALBC Appellants provide important examples for the Court, but they provide no systematic analysis of the districts with respect to which they contend the District Court erred as a matter of fact or law. ALBC Br. at 6-9; 12-13; 29-34; 47-54. The ADC Appellants adopt by reference the ALBC merits brief discussion of the District Court's legal error and/or clear factual error in concluding that race was not the redistricters' predominant motive. ADC Br. at 47.

[7] "*Hays* is not the proper framework to analyze standing in this case." ADC Br. at 52.

directly in every majority-black district and necessarily affecting other districts." *Id.* at 54.

This places the ADC in tension not only with *Hays*, but with the Court's fundamental principles of standing. The "irreducible constitutional minimum of standing" requires the plaintiff, *inter alia*, to have suffered an injury in fact which is "concrete and particularized." *United States v. Hays*, 515 U.S. at 743, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Id.* "We therefore reject appellees' position that 'anybody in the State has a claim,' and adhere instead to the principles outlined above." *Id* at 744 (internal citation omitted).

Absent a district-specific focus, the ADC claims amount only to generalized grievances. The ADC suggests that the Court should vacate and remand for the District Court to consider the ADC's organizational standing claims. ADC Br. at 55-56. Because remand on other issues is appropriate for the reasons we explain elsewhere in this Brief, remand would provide a suitable opportunity for the ADC to perfect its standing by establishing the specific districts in which the ADC and/or its members claim to suffer "concrete and particularized" injuries.[8]

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[8] The ADC appears to have shown standing for Plaintiff Stallworth, who resides in House District 77. ADC Br. at 52-53.

The ALBC Appellants are less direct in disclaiming *Hays* as the basis for their standing, but their brief similarly fails to identify any specific district or set of districts that they contend to be unconstitutional.

2. Neither Appellant's approach to racial classifications provides a meaningful basis to distinguish constitutionally suspect districts from districts that implicate no equal protection concerns.

The ADC Appellants provocatively cast the State's decisions as a "racial quota" in their jurisdictional statement. ADC J.S. at i; ADC Br. at i. The ALBC Appellants similarly cast the State's decisions as "racial ratios." ALBC Br. at 14-18.[9]

But it must be the *implementation* of the State's target policy, and not the fact that the State had targets *ab initio*, that ultimately determines whether particular districts are racial classifications. The fact that a State set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles.

Alabama identified particular minority population percentages as redistricting targets, but this alone cannot establish that the legislature

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[9] The ADC Appellants incorrectly suggest that a State might "stumble" into "excessively-segregated election districts" that violate the Constitution through "good faith." ADC Br. at 3. This Court's equal protection jurisprudence makes clear, however, that intent is necessary for a constitutional violation. *See Washington v. Davis*, 426 U.S. 229 (1976).

subordinated traditional race-neutral districting principles to racial considerations in any particular district that it actually adopted. Nor does the minority population percentage in any district actually adopted by the State necessarily indicate the predominance of race over traditional districting principles.

An election district's minority percentage is not mathematical evidence of racially driven distortions of district boundaries. Reaching a 40% minority target might require extensive geographic contrivances in one region, whereas in another region a 60% minority district could be the natural result of following traditional districting principles to the letter. In other regions, a State might have to violate traditional districting principles in order to *prevent* the creation of a 75% minority district. Needless to say, a district with a 70% minority population does not involve twice the racially driven boundary manipulations of a 35% minority district; neither figure necessarily indicates that any unusual boundary manipulations occurred.

In Alabama, political units of 70% or greater are unexceptional: counties with 70% or greater black population include Bullock (70.59%), Greene (81.85%), Macon (83.13%), Sumter (74.12%), Wilcox (73.08%) and Lowndes (74%).[10] If an election district in Alabama has a black percentage of 70 percent there is no reason to infer that its boundaries

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[10] *See* U.S. Census Bureau 2012 *American Community Survey 5-year Estimates Table B02001.* Many Alabama cities, towns, Census designated places and school districts also have African American populations of 70% or greater. *Id.*

represent a departure from the general rules of redistricting, let alone that such a departure was predominantly attributable to racial considerations, or that it classified voters or stigmatized voters on the basis of their race, any more than a resident of the City of Birmingham, the most populous city in Alabama, could assert a constitutional harm by virtue of the fact that the boundaries of the city yield a 73.4%[11] percent African American municipality. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Alabama unquestionably set out to maintain the pre-existing numbers of majority-black house and senate districts. But this too, standing alone, is insufficient to establish that a racial classification affected any particular district. When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are "just districts." There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.[12]

A State's decision to draw a majority-minority election district, or to set a target minority

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[11] U.S. Bureau of the Census, State and County Quickfacts for Birmingham, Ala. (2010 Census).

[12] *See* ADC Br. at 2 (characterizing districts with black voting-age populations of 29% as "integrated districts," and districts with white voting-age populations of 30% as "super-concentrated black districts.").

percentage in a particular district, are examples of routine race-conscious action, not *prima facie* evidence of a racial classification. States have three choices with respect to the number of majority-minority districts drawn during redistricting: they may decide to maintain the existing number, or to either increase or decrease the existing number. Feigned ignorance of how many majority-minority districts are drawn is not a fourth option; once again, it is unrealistic to suggest that Alabama can, would or should act unaware of the racial implications of its decisions.

Any State with a sizable minority population will be aware of the racial consequences of its boundary changes, particularly where the racial composition of the districts has a predictable and substantial impact on election outcomes, as is the case in Alabama. It is unrealistic to believe that prohibiting States from acknowledging racial considerations in their redistricting decisions will prevent States from having such considerations in the first place. States assuredly will consider the racial impact of their redistricting decisions; a hair-trigger on strict scrutiny merely will require States to resort to ever more subterfuge and dissembling about their redistricting.

Had the State abandoned its initial targets in favor of districts to the Appellants' liking, it is most doubtful that Appellants would have pressed a constitutional claim against the State's redistricting plans, notwithstanding the State's initial targets. Even if Appellants pressed such a claim, this Court would have no reason take cognizance of such an

ephemeral claim if the targets had no practical impact on the actual boundaries. If the Appellants had filed a constitutional challenge after the State had set its targets, but before the final plans were adopted, no ripe Article III dispute would have existed. See *Texas v. United States*, 523 U.S. 296, 297-302 (1998) (declaratory judgment action concerning whether Section 5 of the Voting Rights Act applied to the implementation of certain sections of the Texas Education Code not ripe for adjudication). Any harm inherent in setting such targets only ripens into a case or controversy if it causes the eventual district boundaries to be deformed along racial lines affecting an individual. More colloquially, the proof is in the pudding.

3. Neither of the Appellants has grappled with important remedial shortcomings inherent in their theories of liability.

One of the principal benefits of the *Miller* formulation is that it precisely identifies the remedial obligations of the lower courts. If a district has been drawn with features that subordinate traditional districting principles to race without sufficient justification, then the straightforward remedial obligation of the district court is to ensure that the unconstitutional district is redrawn so as to remove the offending features. If the State fails to do so, then the district court must fashion a remedy that corrects the unconstitutional features but respects the State's districting policies and choices so far as possible. See *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996). *See also Perry v. Perez*, 132 S. Ct. 934, 941 (2012). Even this may prove

complicated in practice, but when *Miller* is followed both the State and the district court have the benefit of correcting specific identified flaws.

Conversely, if this Court were to reverse the District Court and remand for remedial proceedings based upon the current record, there would be few if any parameters to guide the District Court in fashioning a suitable remedy. On the current record, there are no findings that traditional districting principles were subordinated – whether for racial reasons or for non-racial reasons – with respect to any district. For example, the District Court would have no idea whether any of the State's precinct splits should be respected or disallowed.

Furthermore, the brief for the ALBC Appellants does not identify which districts they contend must be redrawn. The brief for the ADC is somewhat more specific, apparently contending that District 26 was unconstitutional. ADC Br. at 12-15. The ADC also challenged the constitutionality of Senate Districts 7, 11 and 22 at trial. J.S. App. at 166-173.

But neither Appellant appears to have ever clearly identified what it contends to be the constitutionally-acceptable minority percentages for the challenged plans as a whole, nor has either Appellant identified the minority percentages that it contends are required to comply with the Voting Rights Act in remedial house and senate plans as a whole. The District Court made no useful findings on these issues, having found that the plaintiffs'

evidence on this issue was in conflict at trial.[13] The District Court also found that the Appellants provided no alternative redistricting plans that are acceptable under the State's redistricting rules, J.S. App. at 72, 88-89, 114, 116-119, and so there is no finding that an illustrative plan exists to demonstrate the contours of a constitutional plan.

A general admonition to the State to redraw its districts without setting racial targets would have little practical value if the findings of liability do not identify the essential differences between constitutional districts and unconstitutional districts, and would render an attempt to fashion a

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[13] The District Court noted that the ADC plaintiffs' expert, Theodore S. Arrington, testified that "[A] 51 percent voting-age population is enough to give minority voters the opportunity to elect the candidate of their choice anywhere in the State, and he suggested that, "[c]ertainly, 54–56% concentration is enough everywhere. (Ex. NPX 323, 15, 17)." J.S. App. at 91. He explained that, although experts used to think that a minority presence of 65 % was necessary to ensure that the minority group would be able to elect the candidate of its choice, the increased registration and mobilization of black voters has reduced that number. (Ex. NPX 323, 19)." *Id.* However, the District Court noted that Dr. Joe Reed, the Chairman of the Alabama Democratic Conference since 1970, testified that a majority-black district in Alabama ordinarily needed to be about 60% African American in total population to allow African American voters to elect their candidate of choice. *Id.* at 164-165. The Court also cited to testimony by Senator Dial (R), who co-chaired the legislature's redistricting committee, in which he said that State Senator Hank Sanders (D) and State Representative Thomas Jackson (D), who were African Americans representing majority-black districts, requested during public hearings that their districts have an African American population of 62% and 62 to 65%, respectively. *Id.* at 30-31.

remedy on this record an essentially standardless exercise, resulting in further confused appeals to this Court.

The District Court on remand should provide an opportunity for the parties to supplement the record with additional evidence, and then reexamine the record with respect to specific districts.[14]

District-specific findings will permit any eventual remedy to provide a focused, predictable and judicially economical resolution.

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[14] *See, e.g.*, 28 U.S.C. § 2160 (this Court may remand and require such further proceedings as may be just under the circumstances); *Perry v. Perez*, *supra* (remand was ordered where the record was unclear whether the District Court followed the appropriate standards in drawing interim maps for the 2012 Texas elections); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 235-236 (2000) (remand ordered where the record below was unclear on facts germane to the constitutional question to be resolved on appeal); *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992) (although the Court established the legal framework on remand, it found that further factual development in the lower court would be necessary for a final determination); *Rapanos v. United States*, 547 U.S. 715, 757 (2006) (remand ordered due to "paucity" of the record and because of the lower court's application of an incorrect legal standard); *Bragdon v. Abbott*, 524 U.S. 624, 654-55 (1998) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court").

II. THE MERITS OF STRICT SCRUTINY ARE NOT ADEQUATELY PRESENTED FOR PLENARY REVIEW

A. This Court Has No Occasion to Address the Merits of Strict Scrutiny if it Affirms the District Court's Holding that the Challenged Districts are not Racial Classifications

We have argued above that the District Court's predominant motivation analysis is legally and factually flawed under the Court's existing legal standards, and therefore merits a remand for reconsideration under the correct legal standards. If this Court does affirm the District Court's findings that race was not a predominant motivation for any of the challenged districts, however, then that should mark the conclusion of these appeals.

The District Court addressed the Section 5 issue merely as a contingency in the event that its predominant motivation analysis was to be reversed. There is no need to consider whether Section 5 of the Voting Rights Act provided a compelling interest for the State, or whether the challenged plans were narrowly tailored to that interest, if this Court concludes that neither challenged plan has a racially gerrymandered district per *Miller*. "Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones." *Bush v. Vera*, 517 U.S. at 964.

B. The Question of Whether Section 5 of the Voting Rights Act Can Constitute a Compelling Interest is Presented if the Court Reaches the Merits of Strict Scrutiny Review

Section 5, while it applied to Alabama, would provide a compelling interest if the State acted in justifiable reliance upon it. But *Shelby County v. Holder*, *supra*, left Section 5 of the Voting Rights Act functionally inoperative. If this Court reaches strict scrutiny, it will then have to grapple with the question of what force, if any, continues to be exerted by Section 5 of the Voting Rights Act.

The District Court assumed that, notwithstanding *Shelby County* Section 5 could provide a compelling interest for the State's challenged redistricting plans. The District Court then went on to conclude that Section 5 provided such an interest, and that the challenged plans were constitutionally narrowly tailored to that interest. J.S. App. at 176-186. Judge Thompson vigorously disagreed, arguing in dissent that because Section 5 was inoperative with respect to Alabama at the time of the District Court's decision, the District Court was obliged to disregard Section 5 as a possible compelling interest. J.S. App. 267-269.

If as a result of this appeal the District Court takes up the question of remedy, then Section 5 clearly would not provide a constraint on the State or the District Court in fashioning new districts, absent a new coverage enactment by Congress. Yet the District Court found that Section 5 would provide a compelling interest for the State to go on using

otherwise unconstitutional election districts. To uphold the District Court, this Court would therefore have to arrive at the seemingly paradoxical conclusion that Section 5 is simultaneously both dead and alive with respect to post-2006 redistricting in Alabama. Resolving this paradox would turn upon the question of whether Section 5 can justify an otherwise unconstitutional election district solely because it was in force at the time the law was enacted.

The District Court majority cited no legal authority in support of its decision to apply the law existing at the time the Acts were adopted, and the majority's decision was inconsistent with the long-standing general principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). As the dissent noted below, "changed circumstances may . . . transform a compelling interest into a less than compelling one." J.S. App. at 268, *citing United States v. Antoine*, 318 F.3d 919, 921 (9th Cir. 2003), *cert. denied, Antoine v. United States*, 540 U.S. 1221 (2004).

At least one district court has found that Section 5 objections interposed after 2006 are no longer binding on States. In *Henry D. Howard, et al., v. Augusta-Richmond County, Georgia Commission, et al.*, CV 114-097 (S.D. Ga., May 13, 2014), the District Court determined that the plaintiffs' Section 5 enforcement action with respect to post-2006 voting

changes was moot in the wake of the *Shelby County* decision and dismissed the plaintiffs' claims.

Further, in *Texas v. Holder*, 133 S. Ct. 2886 (2013), the Court vacated the judgment of the three-judge district court for further consideration in light of *Shelby County*. On remand, the District Court dismissed all of the plaintiffs' claims based on *Shelby County*. *See Texas v. Holder*, 2014 WL 3895624 (August 11, 2014) (the District Court discussed the dismissal of the plaintiffs' claims in its decision denying an attorneys' fee claim by one of the parties).[15]

These decisions strongly – if not conclusively – indicate that Section 5 is no longer a constraint on the implementation of post-2006 voting changes.

This Court's general jurisprudence also strongly suggests that *Shelby County* retroactively vitiated any Section 5 interest that might once have existed with respect to the challenged redistricting plans. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), the Court held that when it applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of

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[15] *See also Hall v. Louisiana*, No. 12-00657-BAJ-RLB, 2013 WL 5405656, at *6 (M.D. La. Sept. 27, 2013) (concluding that *Shelby County* applied retroactively to nullify all of the plaintiff's claims); *Bird v. Sumter Cnty Bd. of Educ.*, No. 1:12-CV-76, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013) (Finding that after *Shelby County*, "[t]he issue of preclearance is no longer extant").

whether such events predate or postdate the Court's announcement of the rule. *Id.* at 97.

Arguably, a limited exception could be fashioned in this case in recognition of the State's legitimate expectation of consistency in the conduct of its elections. This Court could, in a roughly parallel sense to *Reynolds v. Sims*, 377 U.S. 533 (1964), fashion a rule that would credit a State's justifiable reliance upon the federal redistricting standards in effect when a plan was adopted, even if those standards are later rendered inoperative.[16] As discussed in the following section, that rule would be unavailing in defense of the District Court's unjustifiable interpretation of Section 5 in this case, but it could assist in providing guidance to the District Court on remand or to other courts presented with similar claims.

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[16] In *Reynolds v. Sims*, 377 U.S. at 583-584, this Court found that Alabama's state senate and house districts were unconstitutionally malapportioned, but recognized that there was a need for a limit upon how frequently a state might be required to redistrict in order to achieve population equality. The *Reynolds* Court settled upon ten-year intervals as sufficient. *Id.* In doing so, it was implicit that intervening population changes might result in districts that would not satisfy the constitutional standards, but the state's interests in predictability and continuity provided countervailing considerations.

C. If Section 5 *Can* Constitute a Compelling Interest, the Cases Should Be Remanded to the District Court for Reconsideration Under a Correct Statutory Interpretation

Assuming that this Court: 1) reverses the District Court with respect to the threshold determination regarding racial gerrymandering; 2) concludes that strict scrutiny must apply; and 3) finds that Section 5 of the Voting Rights Act can – as a matter of law – provide a compelling interest, then the case should be remanded to the District Court for reconsideration under a proper reading of Section 5.

The Appellants correctly have identified the irredeemably flawed reading of Section 5 that the State professed to have followed, which was uncritically adopted by the District Court. *See, e.g.*, ALBC Br. at 23-28, 46, 55, 58-61; ADC Br. at 24-43. The District Court cited no authority for its construction of the Section 5 retrogression standard, which in fact contravened this Court's longstanding decisions and ignored the actual administrative practice of the Department of Justice.

When the Court first formulated the retrogression standard in *Beer v. United States*, 425 U.S. 130, 141 (1976), it looked to the functional ability to elect candidates of choice. The Court in *Beer* found that the application of the retrogression standard to the facts of that case was "straightforward." The Court noted that under the previous plan, none of the districts had a clear majority of African American voters and no African Americans had been elected to the New Orleans City Council. Under the new plan,

the Court determined that African Americans would constitute a majority of the population in two of the five districts and a clear majority in one of them. Thus, the Court found that there was every reason to predict that at least one and perhaps two African Americans could be elected to the Council under the plan, and that it was erroneous for the District Court to conclude that the plan violated Section 5. *Id.* at 142.

The Court also construed Section 5 retrogression in a functional sense in *City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983). The Court, citing *Beer v. United States*, *supra*, held that the changes to the voting system were not retrogressive because they did not "increase the degree of discrimination against blacks." The Court reversed the District Court's findings to the contrary as clearly erroneous and concluded that the changes did not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

In *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-479 (1997) (*Bossier I*) the Court looked at the number of majority-black districts, not whether individual-district reductions of the minority population had occurred, in assessing whether the proposed plan was retrogressive.

To the extent that the State might assert that some uncertainty nonetheless remained after these decisions, this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) left no doubt whatsoever that preventing retrogression under Section 5 did not lock

States into maintaining preexisting levels of minority population.

Despite the fact that these holdings uniformly applied a functional approach to retrogression under Section 5, the District Court adopted the State's erroneous interpretation of retrogression, i.e., that it could not reduce the relative populations of African Americans in the majority-minority districts, regardless of whether maintaining those percentages was reasonably necessary to protect the opportunity of African Americans in those districts to elect a candidate of their choice.

As the ADC Appellants also correctly note, the Department of Justice's implementation of Section 5 has posed no general barrier to States that reduce the minority percentages within particular election districts. ADC Br. at 27-32. While circumstances naturally vary from case to case, the District Court's categorical interpretation of Section 5 is indefensible both in terms of the federal court standards and what could reasonably be anticipated during Department of Justice Section 5 administrative review.

Accordingly, if this Court reaches the issue, it must vacate the District Court for its inexcusable failure to apply the correct legal standards with respect to Section 5 compliance.[17]

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[17] *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further

D. If Strict Scrutiny Applies and Section 5 of the Voting Rights Act Cannot Constitute a Compelling Interest, then this Appeal is Concluded and the District Court Should Be Reversed

Assuming that this Court: 1) reverses the District Court with respect to the threshold determination regarding racial gerrymandering; 2) concludes that strict scrutiny must apply; and 3) finds that Section 5 of the Voting Rights Act cannot – as a matter of law – provide a compelling interest, then this appeal will be complete, and the judgments of the District Court should be reversed. For the reasons discussed above, it would be premature and likely counterproductive to resolve this appeal by such a reversal, but should the Court do so, the only remaining issue in the case would be remedial proceedings before the District Court.

In the Appellees' Joint Motion to Dismiss or Affirm filed in the *ADC v. State of Alabama* case, the State appears to argue for the first time that its compliance with Section 2 of the Voting Rights Act required that the State retain African American populations in majority-minority districts at a rate of 60-65%, and that as a result, its redistricting plans pass strict scrutiny. *See* Appellees' Joint Motion to Dismiss or Affirm at 21-25.

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proceedings to permit the trial court to make the missing findings"). *See also Rapanos v. United States*, 547 U.S. at 757 (remand appropriate where the lower court applied the incorrect legal standard); *Maracich v. Spears*, 133 S. Ct. 2191, 2208-2209 (2013); *Paroline v. U.S.*, 134 S. Ct. 1710, 1730 (2014).

However, the role of Section 2 as a compelling interest is not properly presented in these appeals. The State never asserted in the District Court that the challenged house and senate plans were narrowly tailored to a compelling interest in complying with Section 2 of the Voting Rights Act.

Such a last-minute assertion of a general interest in Section 2 compliance does not merit plenary consideration by this Court for several reasons. To begin with, because Section 2 was not raised or considered below as a compelling state interest for purposes of strict scrutiny analysis, it is presumptively improper to assert at this juncture.

Furthermore, no exceptional circumstances are present here.[18] Nothing prevented the State from raising Section 2 in a timely fashion; evidently the State simply chose not do so. Furthermore, this Court's order noting probable jurisdiction specifically included Section 5 of the Voting Rights Act as a question presented, but was silent as to Section 2. Order of Probable Jurisdiction, June 2, 2014.

This Court may have the occasion to consider the extent of the Section 2 interest in a future appeal, but the proper case would be one where the lower court has found one or more districts to be racial classifications, the defendants have asserted that their actions were narrowly tailored to ensure compliance with Section 2, and the lower court has

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[18] *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Wood v. Milyard*, 132 S. Ct. 1826, 1934 (2012); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. at 2259 n.9.

specifically assessed the evidence as to whether Section 2 is a compelling interest and the extent to which the challenged district departs from that interest.

For example, this Court summarily affirmed the judgment of a three-judge court in *King v. Illinois State Bd. Elections*, 522 U.S. 1087 (1998). The three-judge court found that a majority-Latino district in Chicago was subject to strict scrutiny because its convoluted boundaries were chosen specifically to unite Latino populations. *King v. Illinois State Bd. of Elections,* 979 F. Supp. 619, 620-626 (N.D. Ill. 1997).

Under this Court's ruling in *Miller*, there was no serious question in *King*, *supra*, that strict scrutiny was required. At the same time, the three-judge court found that this arrangement was a narrowly-tailored response to a very specific geographical dilemma, namely that the African American population in Cook County was sufficiently numerous to maintain three reasonably compact majority-black congressional districts, and that the Latino population was sufficiently numerous to draw a reasonably compact majority-Latino congressional district, but that at least one district had to be non-compact for all four to coexist. *Id* at 623. Finding that Section 2 provided a compelling reason to draw three majority-black districts and one majority-Latino district, the district court found that because the challenged district was non-compact only to the extent needed to perform an "end-run" that linked together geographically-proximate Latino neighborhoods (between which an existing majority-

black congressional district lay), it was therefore narrowly-tailored and constitutional. *Id.* at 623-626.

We have respectfully argued that the correct disposition of these appeals is for the Court to vacate and remand for reconsideration of the threshold racial gerrymandering issue under the proper legal standards. In that event, the District Court may consider reopening the record to provide the parties an opportunity to develop the Section 2 issue with the benefit of this Court's guidance. In particular, a properly conducted district-specific identification of which districts, if any, are racial classifications, and for what reasons, will significantly sharpen the focus of any consideration of the Section 2 interest.

CONCLUSION

For the foregoing reasons, the judgments of the District Court should be vacated and these appeals remanded for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 13-895 & 13-1138

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

THE STATE OF ALABAMA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights before state and federal courts, including lawsuits involving constitutional and legal challenges to discriminatory state voter registration laws. *See, e.g.*, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). As such, LDF has a significant interest in ensuring the full, proper, and continued enforcement of the Voting Rights Act and United States Constitution.

SUMMARY OF THE ARGUMENT

The focus of this brief is whether Alabama's redistricting plan satisfies strict scrutiny under *Shaw v. Reno*, 509 U.S. 630 (1993), *i.e.*, was it narrowly tailored to a compelling state interest. Amicus contends that compliance with the Voting Rights Act (VRA or Act) is a compelling state interest, *see* Part I, but that Alabama's redistricting plan was not narrowly tailored, *see* Part II.

ARGUMENT

I. Compliance with the Voting Rights Act Is a Compelling State Interest.

The Voting Rights Act of 1965 was enacted to "address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the

Constitution.'" *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2618 (2013) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

In the decision below, the majority and dissent agreed that compliance with the VRA is a compelling state interest. Appendix to the Jurisdictional Statement in No. 13-895 ("J.S. App.") 173 (majority); *see* J.S. App. 244 (dissent). That conclusion is consistent with this Court's guidance in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), in which all eight Justices who reached the issue agreed that compliance with Section 5 of the Act is a compelling state interest. *See id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part).

As Justice Scalia noted in *LULAC*, this Court had upheld Section 5 "as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote." *Id.* Thus, at the time of Alabama's redistricting, Section 5 was binding on Alabama by virtue of the Supremacy Clause, which "obliges the States to comply with all constitutional exercises of Congress' power." *Bush v. Vera*, 517 U.S. 952, 991-92 (1996) (O'Connor, J., concurring) (recognizing that compliance with Section 2 of the VRA is a compelling state interest). And, "[i]f compliance with [Section 5 of the VRA] were not a compelling state interest, then a State could be placed in the impossible position of having

to choose," between compliance with the VRA and compliance with *Shaw* and its progeny. *LULAC*, 548 U.S. at 518 (Opinion of Scalia, J.).

The conclusion that compliance with the VRA is a compelling state interest "is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring). Racial discrimination in voting causes a grave constitutional injury because it lies at the intersection of race, the most suspect classification, and the right to vote, the right "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As this Court recognized in *Shelby County*, 133 S. Ct. 2631, "any racial discrimination in voting is too much."

Congress has carefully studied the problem of racial discrimination in voting, and it has determined that the Voting Rights Act is necessary to remedy unconstitutional voting discrimination. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 180-82 (1980) (discussing Section 5); *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (discussing Section 2). These determinations are entitled to respect both because of Congress's expressly delegated authority under the Reconstruction Amendments, and because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions," *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (citations and internal quotation marks omitted)—questions such as what tools are necessary to remedy a complex and persistent problem like racial discrimination in voting. The failures of legislative

and judicial efforts to address such discrimination prior to the VRA are well-documented. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197-98 (2009).

Amicus recognizes that this Court has held that the VRA's section 4(b) coverage provision is unconstitutional. *Shelby County*, 133 S. Ct. at 2629. This Court, however, did not question Congress's authority under the Reconstruction Amendments, or the importance of Congress's institutional role in undertaking legislative factfinding or making predictive judgments in this area. *See Nw. Austin*, 557 U.S. at 205 ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."). And this Court in *Shelby County* stressed that its holding did not undermine other provisions of the VRA. *See, e.g.*, 133 S. Ct. at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

In sum, compliance with the VRA is a compelling state interest: the VRA enforces the Reconstruction Amendments, and the Supremacy Clause obligates the States to comply with the Act. As another three-judge court stated in holding that compliance with Section 2 of the VRA is a compelling state interest:

> "In *Shaw*, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination, provided the State has a 'strong basis in evidence for concluding that remedial action is necessary.' This

> compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life."

King v. State Bd. of Elections, 979 F. Supp. 619, 622 (N.D. Ill. 1997) (citations and alterations omitted); *summarily aff'd* 522 U.S. 1087 (1998).

II. Alabama's Legislative Redistricting Was Not Narrowly Tailored to Comply with the Voting Rights Act.

Although amicus agrees with the District Court that compliance with the Voting Rights Act is a compelling state interest, amicus disagrees with the conclusion of the majority below that Alabama's legislative redistricting was narrowly tailored.

Amicus recognize that, particularly in the redistricting context, narrow tailoring does not require perfect tailoring. "[T]he 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests." *Vera*, 517 U.S. at 977 (plurality opinion). When a State has a "'strong basis in evidence'" for concluding that its redistricting decisions are "reasonably necessary" to comply with the Voting Rights Act, the redistricting plan is narrowly tailored. *Id.* (discussing Section 2) (citations omitted); *see also LULAC*, 548 U.S. at 519 (Opinion of Scalia, J.) (discussing Section 5).

Thus, districts designed to comply with the VRA that are "*reasonably* compact and regular, taking into account traditional districting principles . . .

may pass strict scrutiny"; they need not "defeat rival compact districts designed by plaintiffs' experts [as hypothetical alternatives] in endless 'beauty contests.'" *Vera*, 517 U.S. at 977 (plurality opinion) (emphasis in original); *see also id.* ("We . . . reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'") (citation omitted).

Here, the majority of the District Court concluded that Alabama's redistricting was narrowly tailored because the legislature had a strong basis in evidence for believing that: (a) maintaining the number of majority-Black districts; and (b) maintaining the percentages of Black voters in those districts, were both reasonably necessary to comply with Section 5 of the VRA. J.S. App. 183. Amicus agrees with the majority about the first point, but not the second.

A. The VRA Can Require the Creation or Maintenance of Majority-Minority Districts.

Shortly after passage of the VRA, it "became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. . . . [designed to] reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice.'" *Shaw*, 509 U.S. at 640-41 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). Such unconstitutional efforts to "cancel out or minimize the voting strength" of minority voters, *White v.*

Regester, 412 U.S. 755, 765 (1973), are known as vote dilution. This Court has always interpreted the VRA to prohibit vote dilution, which can "nullify [minority voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen*, 393 U.S. at 569.

A necessary precondition for vote dilution is racially polarized voting, a phenomenon that can be manipulated by jurisdictions to enact districting schemes or other measures (such as at-large voting) that serve to freeze minority voters out of the political process. And in voting, as in many other areas, stark polarization along racial lines has long been an unfortunate reality throughout this country. *See, e.g.*, *LULAC*, 548 U.S. at 427 (majority opinion of Kennedy, J.) (citation omitted) (noting that the district court had found "found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State'").

In a total of "6,667 House elections in white majority districts between 1966 and 1996 . . . only 35 (0.52 percent) were won by blacks." David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* 10 (1999). This is especially true in Alabama, where, as of 2005, *every* African-American member of the legislature was elected from a single-member district with an effective black voter majority. *See Voting Rights Act: Section 5 of the Act — History, Scope & Purpose: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong. 3199 (Oct. 25, 2005) (statement of James U. Blacksher). Stated

differently, in 2006, Alabama had no Black officials elected statewide, and virtually all Black local officials were elected from majority-minority districts – notwithstanding the fact that Black people comprise more than 26% of the population. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary*, 109th Cong. 388-89 (July 13, 2006).

While there has been undeniable progress, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (Kennedy, J.) (plurality opinion). And, while racial polarization has declined in some parts of the country, data from recent federal elections show that in other areas, including Alabama, "the extent of racial polarization in presidential elections *increased* over the past decade," even while "account[ing] for partisan identification," meaning that "the race of the voter continues to constitute a statistically significant factor in determining vote choice even after controlling for party." Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. F. 205, 210, 218 (2013) (emphasis added).

The 2008 Presidential election results, for example, confirm the existence of extreme racial polarization in Alabama. President Obama received near-unanimous support from Black voters, with 98 percent of Black voters pulling the lever for him, but received support from only 10 percent of white voters in Alabama—his worst showing among the 50 states. Brief of Nathaniel Persily, et al. as Amici Curiae in *Northwest Austin*, No. 08-322, at 11-12. Two additional striking examples of racially polarized voting, "indicative of the racial cleavage that exists in Alabama to this day," were the 2003 and 2004 unsuccessful voter referenda to remove unconstitutional Jim Crow provisions of Alabama's Constitution, including poll tax language. July 13, 2006 Hearing, at 367, 372.

To combat vote dilution, the VRA sometimes requires jurisdictions to create or maintain majority-minority districts. *See, e.g., Georgia State Conference NAACP v. Fayette County Bd. of Commissioners*, 950 F. Supp. 2d 1294, 1312, 1316, 1322, 1326-27 (N.D. Ga. 2013) (finding the creation of a majority-minority district necessary to remedy a Section 2 violation based on the county's use of at-large elections, in combination with racially polarized voting, to prevent Black voters from ever electing candidates of choice to either the county school board or board of commissioners in nearly two centuries). Such districts can be essential to ensuring that the majority, "by virtue of its numerical superiority," does not always defeat the choices of minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). In other words, in light of the

reality of racially polarized voting, majority-minority districts are sometimes necessary for minority voters to have a meaningful opportunity to participate in the political process and to elect candidates of their choice.

Indeed, much of the progress caused by the VRA has been the result of majority-minority districts. In *Northwest Austin*, this Court noted, as one of the VRA's great successes, that "minority candidates [now] hold office at unprecedented levels." 557 U.S. at 202. Such office holding has been made possible because, notwithstanding persistent racial polarization, the VRA has required the creation of majority-minority districts to combat vote dilution. *See, e.g.*, Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation*, in Quiet Revolution in the South 335 (Chandler Davidson & Bernard Grofman eds., 1994) (noting that since the enactment of the VRA, "the increase in the number of blacks elected to office in the South [has been] a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts").

In this case, the Alabama legislature had a strong basis in evidence to believe that racially polarized voting remains stark and persistent in the State, *see* J.S. App. 84-85; and, therefore, amicus agrees with the District Court that maintaining the same number of majority-Black districts was reasonably necessary to comply with Section 5. As this Court has explained, under Section 5's non-retrogression principle, "the minority's opportunity to elect representatives of its choice," may not be

"diminished, directly or indirectly, by the State's actions." *Vera*, 517 U.S. at 983 (plurality opinion) (emphasis omitted); *see also Miller v. Johnson*, 515 U.S. 900, 906 (1995) (Section 5 prohibits "'voting-procedure changes . . . that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'") (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). The Alabama legislature's decision to maintain the same number of majority-Black districts, standing alone, would have passed muster under strict scrutiny.

B. The VRA Does Not Require Fixed Percentages of Minority Voters.

The drafters of Alabama's redistricting plan also attempted to maintain "as closely as possible" the Black population percentage in the majority-Black districts because they believed that doing so was required by Section 5. J.S. App. 33 (majority); J.S. App. 245 (Thompson, J., dissenting). That is not a "correct reading of § 5," which means it cannot justify Alabama's use of race as a predominant factor in these districting decisions. *Shaw v. Hunt*, 517 U.S. 899, 911 (1996); *see* J.S. App. 244 (Thompson, J., dissenting).

As discussed, Section 5 prohibits retrogression, *i.e.*, diminishing minority voters' opportunities to elect candidates of their choice. *See Vera*, 517 U.S. at 983 (plurality opinion). But not all reductions in the minority population of a majority-minority district are retrogressive. Judge Thompson noted an obvious example: reducing a district's Black population from 99% to 98% is not retrogressive

because Black voters will still retain their ability (or opportunity) to elect a candidate of choice in the new district. *See* J.S. App. 253.

The majority below nonetheless concluded that the 2006 Amendments to Section 5, which prohibit retrogression in minorities "ability to . . . elect their preferred candidates of choice," 42 U.S.C. § 1973c, mean that any reduction in the minority population of a majority-minority district violates Section 5. J.S. App. 180.[2] This interpretation, however, "is contrary to the intent of Congress" and "has been rejected by both entities primarily responsible for administering § 5." J.S. App. 251 (Thompson, J., dissenting).

As the majority of the District Court recognized, Congress's intent through the 2006 Amendments was to restore the retrogression standard set forth in *Beer*, 425 U.S. at 130, and reverse what Congress viewed as a departure from that standard in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* J.S. App. 179.

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[2] Although the majority below stated that "the Alabama Legislature correctly concluded that it could not . . . *significantly* reduce the percentages of black voters in the majority-black districts," J.S. App. 180 (emphasis added), what it meant by "significantly" is unclear. The Alabama Legislature did not seek to prevent "significant" reductions in the Black populations of majority-Black districts, it sought to prevent, as much as possible, any reduction in the Black populations of majority-Black districts. *See* J.S. App. 33 (majority); J.S. App. 245 (Thompson, J., dissenting).

Congress's concern with *Georgia* was *not* that the case permitted reductions in the minority population percentage of majority-minority districts (which both the majority and dissent in *Georgia* agreed were not categorically prohibited by Section 5). Instead, Congress's concern was that *Georgia* permitted States to trade "districts where minority voters *had actual ability to elect* in exchange for amorphous influence districts or apparently powerful jobs for minority representatives." J.S. App. 254 (Thompson, J., dissenting) (emphasis added). It is this aspect of *Georgia*, and this aspect alone, which Congress overturned in the 2006 Amendments. *See id.*[3]

Thus, the 2006 Amendments prohibit the dismantling of districts where minority voters have the ability to elect candidates of choice, but the Amendments do not prohibit all reductions in the minority population of a majority-minority district.

Determining whether a district retains the opportunity for minority voters to elect candidates of choice is a fact-specific inquiry, which requires

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[3] The majority below also erred in suggesting that there is a difference between the "ability to elect" standard and the question of whether minority voters have opportunities to elect candidates of choice. J.S. App. 181. As the majority itself recognized, the "ability to elect" standard is simply the *Beer* standard, J.S. App. 179, and this Court equated the *Beer* standard with electoral opportunities for minority voters. *See, e.g.*, *Vera*, 517 U.S. at 983 (plurality opinion); *Miller*, 515 U.S. at 906.

consideration of numerous factors including registration and turnout rates, the size of the minority population, and the severity of racially polarized voting. *Cf. Texas v. United States*, 831 F. Supp. 2d 244, 272 (D.D.C. 2011) ("Section 5 requires a multi-factored, functional approach to gauge whether a redistricting plan will have the effect of denying or abridging minority citizens' ability to elect representatives of their choice. It does not lend itself to formalistic inquiry and complexity is inherent in the statute."). This is equally true under Section 2's "ability to elect" standard. *See Gingles*, 478 U.S. at 45 ("the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process") (citations and quotation marks omitted).

The Department of Justice (DOJ) explained in its guidance to covered jurisdictions after the 2010 census that the Section 5 retrogression inquiry turns on a context-specific comparison of minority voters' electoral opportunities in the new plan as opposed to the benchmark plan, not predetermined numerical percentages:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the

> electoral behavior within the particular jurisdiction or election district.

76 Fed. Reg. 7470-01, 7471 (Feb. 9, 2011).

Consistent with this standard, DOJ granted preclearance to post-2010 redistricting plans that reduced the minority population percentages in majority-minority districts below the levels in the benchmark plans. *See* Brief of Appellant Alabama Democratic Conference at 30-31. Indeed, DOJ had similarly granted preclearance to post-2000 redistricting plans with reductions in the minority populations of majority-minority districts, *including Alabama's*. *See id.* at 28-30; Brief of Appellant Alabama Black Caucus at 3-4.

In sum, nothing in Section 5, as amended in 2006, requires the maintenance of a specific minority population percentage in majority-minority districts. Alabama's redistricting decisions were premised on an incorrect interpretation of the VRA. Therefore, the State's use of a race as the predominant factor in those decisions was not narrowly tailored to its compelling interest in complying with the Act.

CONCLUSION

The judgment of the District Court should be reversed so that the State may enact a new redistricting plan which complies both with the Voting Rights Act and the Constitution.

Respectfully submitted,

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August 20, 2014

AMICUS CURIAE BRIEF

Nos. 13-895 and 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.
Appellants,

v.

ALABAMA, ET AL.,
Appellees.

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.
Appellants,

v.

ALABAMA, ET AL.,
Appellees.

On Appeal From The United States District Court For The Middle District of Alabama

BRIEF OF NORTH CAROLINA LITIGANTS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF NORTH CAROLINA LITIGANTS AS *AMICI CURIAE* SUPPORTING APPELLANTS

This brief is submitted on behalf of certain individual and organizational plaintiffs who have filed suit challenging the constitutionality of North Carolina's 2011 legislative and congressional redistricting plans as *amici curiae* in support of appellants.[1]

INTEREST OF *AMICI CURIAE*

Amici are residents of North Carolina and nonprofit organizations that focus on protecting voting rights and promoting voter participation in North Carolina. *Amici* are all plaintiffs in litigation currently pending in North Carolina that alleges that various districts in the state's 2011 legislative and congressional redistricting plans were drawn pursuant to racial targets that unconstitutionally classified citizens for voting purposes based on their race. The cases, which also raise state constitutional claims, were consolidated and currently are pending in the North Carolina Supreme Court. *Dickson v. Rucho,* and *NAACP v. State of North Carolina,* No. 201PA12-2.

Amici include white and black voters who live in the racially gerrymandered election districts challenged in the North Carolina litigation. One of those voters is Robinson O. Everett, Jr., who was a

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[1] The parties have consented to the filing of amicus curiae briefs in support of either party and have so informed the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

plaintiff in *Shaw v. Reno*, 509 U.S. 630 (1993). Organizational *amici* include the North Carolina State Conference of Branches of the NAACP, the North Carolina A. Philip Randolph Institute, Democracy North Carolina, the League of Women Voters of North Carolina -- all organizations that participated in the redistricting process in 2011.

Over the past few decades, *amici* have worked together to reach across racial lines in North Carolina and forge alliances that are based not on the color of voters' skin but on the voters' common interests in the important issues of the day. They have a strong interest in ensuring that this progress is not frustrated by a profound misapplication of existing equal protection doctrine and a mistaken understanding of this Court's rulings interpreting the Voting Rights Act. The lower court in the instant case wrongly endorsed the Alabama Legislature's belief that compliance with the Voting Rights Act required it to draw a racially proportionate number of majority-black districts with a specific percentage of black voting age population and thereby failed to properly follow the lessons of *Shaw v. Reno* and its progeny. The North Carolina 2011 redistricting process was similarly flawed, and *amici* can illuminate the impact of this error as applied to other jurisdictions.

SUMMARY OF THE ARGUMENT

Amici urge reversal of the court below because the Alabama Legislature's use of racial targets in drawing new redistricting plans following the 2011 census was an explicit racial classification that was not justified by a compelling governmental interest and was not narrowly tailored. This Court

reiterated in *Bartlett v. Strickland* the well-established principle that the "'moral imperative of racial neutrality is the driving force of the Equal Protection Clause,' and racial classifications are permitted only 'as a last resort.'" 556 U.S. 1, 21 (2009) (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518-19 (1989)). The Court further cautioned that "[o]ur holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." *Bartlett*, 556 U.S. at 23-24 (citing *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1992)).

The North Carolina legislature, like the Alabama legislature, misapplied these principles in the 2011 redistricting by imposing a racial proportionality target for the number of majority-black districts and requiring every district to meet a specific black population percentage target. As in Alabama, the North Carolina General Assembly believed that these fixed racial targets were required by the Voting Rights Act.

As a result of these racial targets, the North Carolina legislature enacted nine state senate districts as majority-black districts where previously none of the state's senate districts were majority-black.[2] They enacted twenty-three majority-black

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[2] Although there were no majority-black state senate districts, in June of 2011 there were seven African-Americans serving in the North Carolina State Senate. Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee 3 (June 17, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%2

state house districts where previously only ten of those districts were majority-black.[3] Finally, they enacted two majority-black congressional districts where previously there were none, increasing the percentage of black voting age population in North Carolina's 12th Congressional District from 42.31% to 50.66%.[4] The General Assembly abandoned traditional redistricting criteria such as geographic compactness and respect for subdivision boundaries in the quest to reach the desired fixed racial targets.

Ignoring decades of progress in increasing opportunities for black voters to participate in the political process, in 2011 the General Assembly

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0Representative%20David%20Lewis_6.17.11.pdf. In Senate Districts 3 and 32, the candidates of choice of black voters were white candidates and were elected in 2008 and 2010. *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7072 (Sept. 4, 2013).

[3] Although there were only ten majority-black state house districts, in June of 2011 there were eighteen African-American members serving in the North Carolina House of Representatives. Joint Statement, *supra* note 2, at 3. In House Districts 8 and 27, both of which were majority-black in voting age population, the candidate of choice of black voters was a white candidate who was elected in 2006, 2008, and 2010. *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7071 (Sept. 4, 2013).

[4] In June of 2011 there were two African-Americans serving in Congress from North Carolina's 1st and 12th Congressional Districts. Statement by Senator Bob Rucho and Representative David Lewis Regarding the Proposed 2011 Congressional Plan 3 (July 1, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7.1.11.pdf.

created more majority-black districts than ever before, thereby entrenching racial stereotypes and tearing apart effective cross-racial coalitions that had evolved over time. *Cf. Alabama Legislative Black Caucus v. State of Alabama*, 989 F. Supp. 2d 1227, 2013 U.S. Dist. LEXIS 178735 at *327 (M.D. Ala. 2013) (Thompson, J. dissenting) ("The purpose of [the VRA] is to help minority groups achieve equality, not to lock them into legislative ghettos."). The General Assembly's use of racial targets in redistricting was justified only by the mistaken belief that they were required by federal law. In addition to North Carolina and Alabama, there is only one other redistricting case, currently pending in Virginia, in which it is alleged that the Legislature admittedly and explicitly used racial targets in drawing districts.

Thus, what is needed here is not a revision of voting rights jurisprudence; nor will reversal of the trial court result in significant upheaval of redistricting maps throughout jurisdictions formerly covered by Section 5 of the Voting Rights Act. Rather, the misinterpretation of the Voting Rights Act's requirements resulting in the unfair imposition of racial targets in redistricting in a few states is an unconstitutional use of race that must be corrected.

ARGUMENT

I. THE VOTING RIGHTS ACT AND EQUAL PROTECTION GUARANTEES WERE WORKING IN NORTH CAROLINA TO AMELIORATE THE EFFECTS OF PAST DISCRIMINATION IN VOTING

In the twenty-eight years since this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the twenty-one years since the Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), voters in North Carolina have made significant progress towards achieving the goals of inclusion and fair representation embodied in the Voting Rights Act. The increasing willingness of white voters to support black candidates at the ballot box has meant that when black voters go to the polls, they have a reasonable chance of electing their candidates of choice even when those candidates are black and even if black voters are not a majority of the electorate. Indeed, in 2011 the record developed by the General Assembly showed that fifty-six times between 2006 and 2011, African-American candidates won election to the state house and senate from districts that were not majority-black, and twenty-two times those candidates were running in majority-white districts. Most of these elections involved candidates of different races, where the victorious black candidate defeated a white challenger, and in some notable cases, that white challenger was the incumbent.

When the North Carolina legislature was drawing Congressional districts following the 1990 Census, there had not been an African-American elected to Congress from North Carolina since 1896,

when George H. White was re-elected for his second and last term. When drawing Congressional Districts in 2011, three different African-Americans had been elected to represent North Carolina's rural coastal plain, and Representative Mel Watt had won seven of ten elections in urban districts that were majority white, including a strongly contested election in 1998 in which his opponent raised over a million dollars and the district was only 32% black in voting age population.[5]

However, the redistricting plans enacted by the General Assembly in 2011 unreasonably take no account of any of the important political progress that has been made in North Carolina. Instead of continuing the gradual transition to a system without racial roadblocks, they set a clear course in exactly the other direction, re-entrenching racial divisions in the political process.

The North Carolina Legislature explicitly imposed two racial targets: 1) The percentage of majority-black districts in each plan must equal the statewide black population percentage (a racial proportionality requirement that was so fixed it might reasonably be called a quota) and 2) Each majority-black district must be over 50% black in voting age population (a minimum black population percentage requirement). Employing these racial targets led the legislature to create nine state senate districts as majority-black districts where previously none of the state's senate districts were majority-black; and twenty-three majority-black state house

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[5] *Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 177-78 (June 4, 2013).

districts where previously only ten of those districts were majority-black. In the congressional plan, the General Assembly enacted two majority-black congressional districts where previously there were none. The districts challenged in *amici*'s litigation as being racially gerrymandered were drawn, with only one exception, with a higher black voting age population percentage than the previous decade. As in Alabama, compliance with the Voting Rights Act was the North Carolina Legislature's only justification for employing these racial targets.

A. The Impact Of Compliance With The Voting Rights Act And Equal Protection Doctrine In North Carolina Before 2011.

North Carolina has an extensive history of official discrimination against African-Americans in voting, as documented by this Court's cases from *Gingles* to *Shaw*. *See, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), *aff'd in part and rev'd in part by Thornburg v. Gingles*, 478 U.S. 30 (1986). In 1982, African-American voters were registered statewide at percentages that lagged behind white voters by fourteen percentage points, and as much as twenty-three percentage points in some counties. 590 F. Supp. at 360. In 1981, the General Assembly enacted a legislative redistricting plan that had no majority-black single-member districts.[6] Following the *Gingles* litigation, the General Assembly enacted

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[6] Research Division, N.C. General Assembly, *Legislator's Guide to North Carolina Legislative and Congressional Redistricting* 20 (March 2011), *available at* http://www.ncleg.net/GIS/Download/Maps_Reports/2011RedistrictingGuide.pdf.

a plan creating ten majority-black single-member districts and one majority-black two-member district for the state house; and three majority-black senate districts.[7] Between 1990 and 2010, the number of majority-black districts for each body decreased by three, while the number of African-American legislators in the General Assembly steadily increased from 18 to 25 in that same period.[8] The following charts show the number of House and Senate Districts where the total black voting age population was greater than 50% from 1992 to the present:[9]

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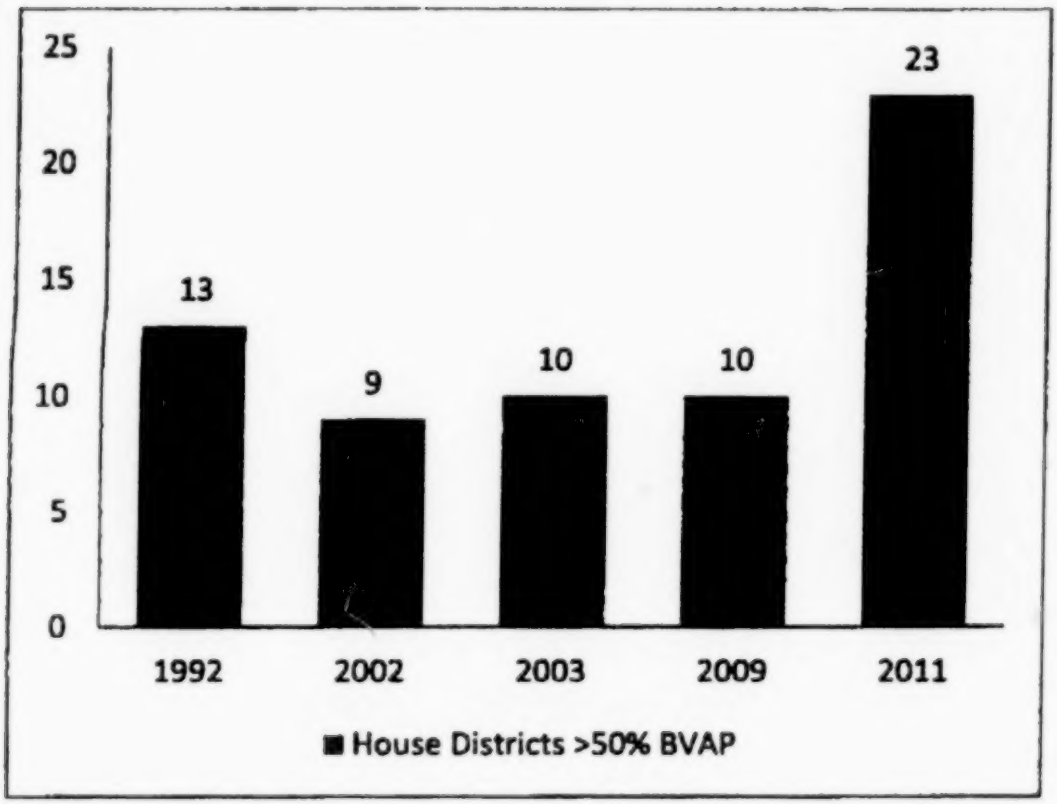
[7] *Id.* at 28.

[8] *See* Joint Statement, *supra* note 2, at 3; Keech and Sistrom, North Carolina, in Davidson and Grofman, eds., QUIET REVOLUTION IN THE SOUTH, THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 166 (1994); *Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 32-35 (June 4, 2013).

[9] Compiled from plan statistics contained in "Redistricting Archives" and "2011 Redistricting Process," *available at* http://www.ncleg.net/representation/redistricting.aspx.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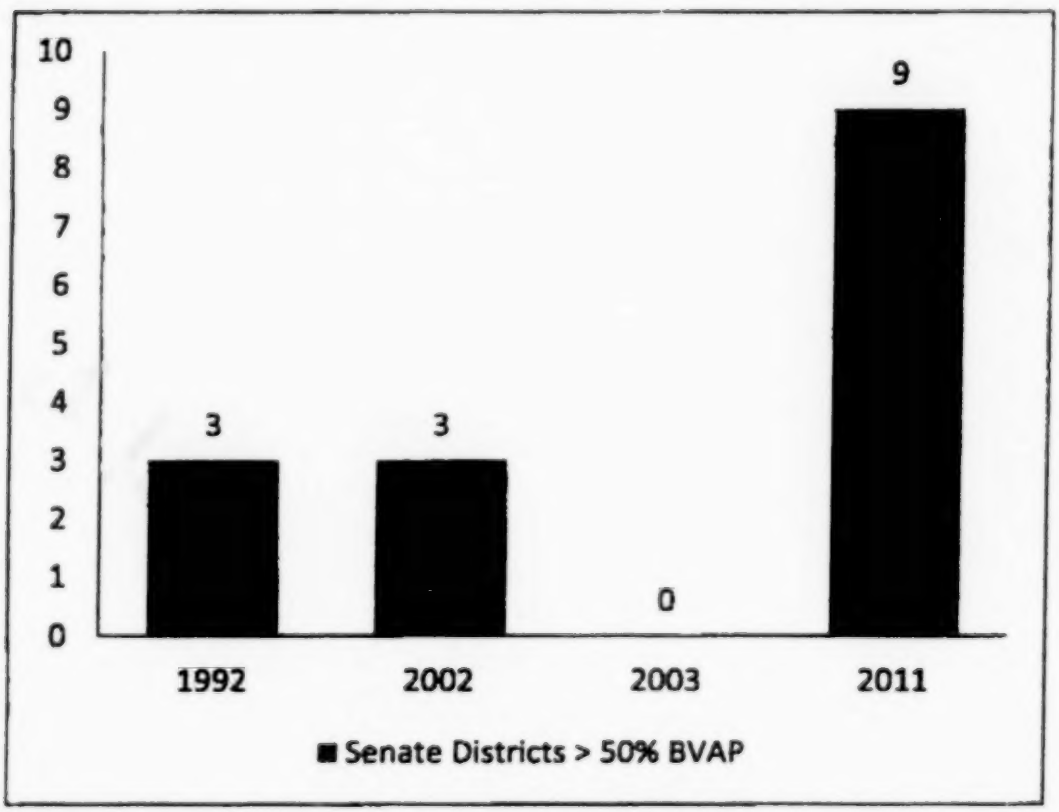
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2011
Senate Districts > 50% BVAP

The decline in the number of majority-black districts was accompanied by increases in the number of African-American legislators and voter registration by black voters. By the time the legislature was redrawing districts in 2011, levels of black voter registration had increased over what they were in 1982.[10]

The progress made in North Carolina is further demonstrated by the fact that between 2006 and 2011, black candidates won fifty-six election contests for state legislative seats in districts that were not majority-black, and twenty-two times in majority-white districts.[11] This pattern of sustained success for black voters over repeated election cycles is precisely what this Court previously found to be inconsistent with an allegation that the ability of black voters "is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77.

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[10] In November 2010, 88.22% of the white voting age population was registered to vote while 89.75% of black voting age population in the state was registered to vote. *See* North Carolina State Board of Elections, N.C. Voter Statistics Results, (Dec. 25, 2010), *available at* http://www.ncsbe.gov/webapps/voter_stats/results.aspx?date=12-25-2010 *and* U.S. Census Bureau, Race, Hispanic or Latino, Age, and Housing Occupancy: 2010 Census Redistricting Data (Public Law 94-171) Summary File, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_PL_QTPL&prodType=table. *See also, Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 384 (June 5, 2013) (expert testimony concerning African-American participation rates in North Carolina).

[11] *Dickson v. Rucho*, No. 201PA12-2, Plaintiff-Appellants'Brief, Appx. 6 (Oct. 11, 2013).

For the Congressional districts, the same pattern of progress was apparent. Congressional Districts 1 and 12 previously were less than 50% black in voting age population and both districts had elected candidates of choice of black voters in the primary and general elections since 1992.[12] In fact, the enacted plans increased the percentage of black voting age population in North Carolina's 12th Congressional District from 42.31% to 50.66%, which is higher than the 32.56% black voting age population district that was used for the 1998 election cycle,[13] and the 43.36% black voting age population district that was used in the 2000 election cycle.[14]

In the most recent election cycles in all state legislative and congressional districts, the candidate of choice of black voters prevailed in 28 of 31 districts with 40%+ black voting age population, for a win rate of 90%.[15] This win rate is no different

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[12] *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7617, 7627 (Sept. 4, 2013).

[13] Redistricting Archives, 1998 Congressional Plan A, *available at* http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/1998_Congressional_Plan_A/Reports/StatewideByDistrict/rptVap.pdf.

[14] Redistricting Archives, 97 House Plan A, *available at* http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/97_House-Senate_Plan_A/Reports/StatewideByDistrict/rptVap.pdf.

[15] *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 962 (Sept. 4, 2013).

than the win rate for black and white candidates of choice of African-American voters in districts that are 50%+ in black voting age population.[16] Since 1986, Section 2 of the Voting Rights Act opened the doors of the state legislature to candidates of choice of African-American voters in an evolving process. *See also* Keech & Sistrom, *supra* note 8, at 155 (noting impact of VRA in increasing black participation and making possible the election of black candidates to public office).

African-American candidates winning in districts ranging from 21% to 41% black in voting age population illustrate that candidates of choice of black voters have built successful multi-racial campaigns. Examples include Dan Blue's ascent to the position of Speaker of the House in 1991, Ralph Campbell's statewide election as State Auditor in 2004, Malcolm Graham's defeat of the well-regarded white-incumbent Fountain Odom in 2006, and Dr. Eric Mansfield's election to the Senate from Fayetteville in 2010. They garnered strong support from black and white voters alike, and achieved winning margins in contested elections as high as 70 to 80% of the vote. Black and white voters have seen their common interests united behind the values they share, and they have seen their elected leaders, honorable and capable men and women of color, ably represent black and white voters together.

Indeed, the record in North Carolina illustrates very well Justice Souter's insight that:

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[16] *Id.* at 1302-03.

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). While racially polarized voting has not disappeared from North Carolina elections since *De Grandy*, it has lessened to the degree that candidates of choice of black voters can be successful in some areas of the state without majority-black districts. It is that pattern of success that the North Carolina General Assembly needed to take into account, but disregarded when drawing its 2011 redistricting plans.

B. The Use Of Explicit Racial Targets In 2011 Was A Departure From North Carolina's Recent Progress.

The use of racial targets in the 2011 round of redistricting in North Carolina was a dramatic

departure from earlier applications of federal voting rights law in redistricting. They started the process of drawing new plans by establishing a fixed racial target: given that blacks are 21.2% of the state's voting age population, to achieve racial proportionality, approximately 10 of the state's 50 senate districts should be majority-black districts and approximately 24 of the state's 120 house districts should be majority-black districts.[17] The racial proportionality goal was implemented without any reference to the extent to which candidates of choice of black voters were elected to state house and state senate districts in various parts of the state, and without any reference to the extent of racially polarized voting throughout the state.[18] Instead, the goal of substantial proportionality was adopted in order to "expedite the preclearance of each plan pursuant to Section 5 of the Voting Rights Act," and to "further the State's obligation to comply with Section 2 of the Voting Rights Act." Joint Statement, *supra* note 2, at 3.

In addition, the legislators believed that any "Voting Rights Act District" drawn to comply with Section 5 of the Voting Rights Act must also comply with *Bartlett v. Strickland*, 556 U.S. 1 (2009), a case interpreting Section 2 of the Voting Rights Act, by being over 50% black in voting age population. They interpreted *Bartlett* to "require that districts drawn to insulate the State from liability under the Voting

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[17] *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7376 (Sept. 4, 2013).

[18] *Dickson v. Rucho*, No. 201PA12-2, Record on Appeal 1041-43 (Sept. 4, 2013).

Rights Act must be drawn with a black voting age population in excess of 50% plus one." Statement by Senator Bob Rucho and Representative David Lewis Regarding Proposed State Legislative Redistricting Plans, 4 (July 12, 2011).[19]

The chairmen of the redistricting committees, Senator Rucho and Representative Lewis, testified that they provided two instructions to their chief architect, the consultant hired to draw districts: 1) draw a majority-black district wherever possible so that black voters are at least a majority of the voting age population in the district and 2) draw sufficient majority-black districts to provide North Carolina's black voters with a substantially proportional opportunity to elect their candidates of choice.[20] These two instructions were identified as the criteria that any plan submitted to the General Assembly must meet. In a public statement issued June 22, 2011, Rucho and Lewis unambiguously stated that they would entertain other redistricting maps "provided the total districts proposed provide black voters with a substantially proportional statewide opportunity to elect candidates of their choice. Moreover, any such districts must comply with *Bartlett v. Strickland*, and be drawn at a level that constitutes a true majority of black voting age population." Statement by Sen. Bob Rucho and Rep.

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[19] *Available at* http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7-12-11.pdf.

[20] *Dickson v. Rucho*, No. 201PA12-2, Record on Appeal 1038-43 (Sept. 4, 2013).

David Lewis Regarding Proposed VRA Districts, 7 (June 22, 2011).[21] Later, Rucho and Lewis explained their rejection of alternative plans that were submitted to them by a citizen group on the grounds that those plans did not meet their racial targets.[22]

In fact, with only one exception in the House plan, all of the districts challenged by *amici* collectively as racially gerrymandered by packing were drawn at or above the black population percentage they had before being redrawn, using 2010 census data. This is in stark contrast to the General Assembly's redistricting plans enacted following the 2000 Census, when, as the Appellants point out, nearly all of North Carolina's House and Senate districts had lower black population percentages than the prior districts and the 2003 plans were precleared by the Department of Justice. *See* Brief of Appellants, No. 13-1138, at 29 (Aug. 13, 2014).

The following charts compare the percentage black voting age population in 1) individual districts challenged by *amici* as racially gerrymandered districts; and 2) the "benchmark" or prior districts.[23]

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[21] *Available at* http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_6.22.11.pdf.

[22] Statement, *supra* note 19, at 4-5.

[23] *Dickson v. Rucho*, No. 201PA12-2 Rule 9(d) Documentary Exhibits 1205 & 1207 (Sept. 4, 2013).

[illegible]	[illegible] BVAP	Enacted Plan BVAP	Difference
5	48.87%	54.17%	5.29%
7	60.77%	50.67%	-10.10%
12	46.45%	50.60%	4.15%
21	46.25%	51.90%	5.65%
24	50.23%	57.33%	7.11%
29	39.99%	51.34%	11.35%
31	47.23%	51.81%	4.58%
32	35.88%	50.45%	14.57%
33	51.74%	51.42%	-0.32%
38	27.96%	51.37%	23.41%
42	47.94%	52.56%	4.62%
48	45.56%	51.27%	5.71%
57	29.93%	50.69%	20.76%
99	41.26%	54.65%	13.38%
102	42.74%	53.53%	10.79%
106	28.16%	51.12%	22.96%
107	47.14%	52.52%	5.38%

Senate District	Benchmark BVAP	Enacted District BVAP	Difference
4	49.70%	53.33%	3.63%
5	30.99%	51.97%	20.98%
14	42.62%	51.28%	8.66%
20	44.64%	51.04%	6.40%
21	44.93%	51.53%	6.60%
28	47.20%	56.49%	9.30%
38	46.97%	52.51%	5.53%
40	35.43%	51.84%	16.40%

The racial proportionality and black population percentage targets employed by the Legislature led them to enact majority-black voting age population districts nearly everywhere possible. In making their redistricting plans public, Rucho and Lewis explained:

> [W]e see no principled legal reason not to draw all VRA districts at the 50% or above level when it is possible to do so. Now that it is apparent that these majority black districts can be drawn, any decision to draw a few selected districts at less than a majority level could be used as evidence of purposeful discrimination or in support of claims against the State filed under Section 2. Thus, in order to best protect the State from costly and unnecessary litigation, we have a legal obligation to draw these districts at true majority levels.

July 12, 2011 Statement at 5. Citing *Johnson v. Degrandy*, 512 U.S. 997 (1994), Rucho and Lewis' statement goes on to assert that providing proportional representation using the racial proportionality target will give the state "an important defense" to any lawsuit that might be filed under Section 2 of the Voting Rights Act. *Id.*

The degree to which adherence to the racial proportionality target led the Legislature to ignore current conditions is best illustrated by the fact that the enacted plans create new majority-black districts in Durham County where, as early as 1986, this Court held that no Section 2 violation occurred because white voters were voting for, and helping to

elect, candidates of choice of black voters. *See Gingles*, 478 U.S. at 77.

Similar to Durham County, the 2011 plan included two majority-black senate districts in Mecklenburg County where previously African-Americans were being elected to the Senate in majority-white districts. The Senate plan added a new majority-black senate district in eleven counties for the first time.[24] In Wake County, where there had never been a majority-black senate district and no majority-black house district since 2002, Linda Coleman, an African-American, won election in 2006 and 2008 in a house district that was 26.70% black in voting age population.[25] Similar patterns are true for the State House districts.[26] Throughout the state, the use of racial proportionality and black population percentage targets led to highly irregular district lines that split counties and precincts, and divided voters from one another on the basis of their race, block by block.

II. ONLY A FEW STATES USED EXPLICIT RACIAL TARGETS WITHOUT REGARD TO CURRENT CONDITIONS IN REDISTRICTING FOLLOWING THE 2010 CENSUS

Reversing the court below in this case will not result in substantial changes to election districts

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[24] *Id.* at 1205.

[25] *Dickson v. Rucho*, No. 201PA12-2, Plaintiff-Appellants' Brief, Appx. 6 (Oct. 11, 2013).

[26] *Id.*

around the country because there are only a few cases currently in litigation where it is alleged that racial targets were used in redistricting. In addition to litigation in North Carolina brought by *amici*,[27] there is a case pending in Virginia alleging that the Virginia General Assembly made the same error regarding the requirements of Section 5 of the Voting Rights Act. *See Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678 (E.D. Va. filed Oct. 2, 2013).[28] In that case, legislators testified that they started with a 55% target in drawing Virginia's Congressional District 3, and ultimately increased the black VAP in that district from 53.9% in the existing plan to 57.2% in the enacted plan.[29] As in North Carolina and Alabama, they believed the 55% black voting age population target was required by the Voting Rights Act, without examining recent election data.[30]

There is also litigation pending in Florida raising federal constitutional claims concerning that state's congressional redistricting plan. *See Warinner v. Detzner*, No. 14-164 (N.D. Fla. filed Mar. 27, 2014).

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[27] An entirely different set of plaintiffs have brought similar racial gerrymander claims against North Carolina's 1st and 12th congressional districts in federal court. *See Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C. filed Oct. 24, 2013).

[28] To date there has been no final ruling from the trial court in this case.

[29] *Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678, Plaintiffs' Post-Trial Brief 5-9 (E.D. Va June 6, 2014), ECF No. 105.

[30] *Id.*

In *Warinner*, the Plaintiffs' amended complaint alleges that Florida's Congressional District 5 is racially gerrymandered because the black voting age population of the district was increased from 49.9% to 50.1% without a proper functional analysis of minority voting rights.[31] However, the *Warinner* case will be impacted by the fact that Congressional District 5 is in the process of being redrawn to remedy state constitutional violations found to exist on other grounds. *See Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490 (Fla. 2d Jud. Cir. Ct. July 10, 2014).

In the post-2010 round of redistricting, there were several other cases raising claims of racial gerrymandering in state legislative or congressional redistricting that have been resolved. None of these cases included admissions by legislators that they interpreted the Voting Rights Act to require explicit racial targets, that is, a specific number of majority-black districts at a certain percentage black voting age population level, without examining current conditions. *See, e.g., Backus v. South Carolina*, 857 F. Supp. 2d 553, 564 (D.S.C.) (three-judge court) *aff'd, Backus v. South Carolina*, 133 S. Ct. 156 (2012) (testimony by one legislator that map drawers "relied on predetermined demographic percentages" but court finds that was not a general motivation of the legislature and that race was just one consideration among many); *Radogno v. Ill. State Bd. of Elections*, 836 F. Supp. 2d 759 (N.D. Ill. 2011) (three-judge court), *aff'd*, 133 S. Ct. 103 (2012) (no

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[31] *Warinner v. Detzner*, No. 13-1860, First Amended Complaint, 5-6, Jan. 16, 2014, ECF No. 22.

racial gerrymander claim against district that was 25% black in voting age population); *Comm. For a Fair and Balanced Map v. Ill. State Bd. of Elections,* 835 F. Supp. 2d 563 (N.D. Ill. 2011) (three-judge court) (partisan, not racial considerations, dominated map, no use of race-based targets for districts); *Fletcher v. Lamone,* 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge court) *aff'd*, 133 S. Ct. 29 (2012) (no evidence that race predominated, no allegations of packing or use of racial targets); *Jeffers v. Beebe,* 895 F. Supp. 2d 920 (E.D. Ark. 2012) (no evidence of racial animus, no allegations of racial targets).

Of these cases, only *Backus v. South Carolina* involved a jurisdiction that was covered by Section 5 of the Voting Rights Act in 2011, and in South Carolina, compliance with Section 5 was not interpreted by the legislature to require the same percentage black voting age population or the same number of majority-black districts as before. For example, State Senate District 7 provided black voters with the ability to elect their candidate of choice, an African-American Senator named Ralph Anderson.[32] Mr. Anderson defeated two non-African-American candidates in the 2008 general

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[32] *See* Senate Preclearance Submission - S. 815, South Carolina Senate Judiciary Committee, *available at* http://redistricting.scsenate.gov/PreclearanceSubmissionsS815.html; and Exhibit – 14, Report by Richard Engstrom, Ph.D., South Carolina Senate Judiciary Committee, *available at:* http://redistricting.scsenate.gov/Exhibits/Exhibit%2014%20%20REPORT%20BY%20RICHARD%20ENGSTROM,%20PHD/Exhibit%2014%20%20Report%20by%20Richard%20Engstrom%20PhD.pdf.

election, winning with 70.1% of the vote.[33] The benchmark district had a 46.1% BVAP, and the 2011 enacted plan had a 43.3% BVAP. The candidate of choice of black voters was winning white votes in the district, and that district did not need to be packed with additional black voters to satisfy Section 5 of the Voting Rights Act.[34]

Indeed, across the whole South Carolina redistricting plan, in three out of the four districts that elected the candidate of choice of black voters despite being under 50% BVAP in the benchmark plan, South Carolina did not increase the black population percentage of the district to 50% BVAP. The fourth district involved only a 1.1% increase in the BVAP. Moreover, the state actually lowered the BVAP percentage in seven out of the twelve districts that elected the candidates of choice of black voters. The South Carolina Legislature did not employ racial targets in its redistricting process.

Thus, the Alabama Legislature's mis-interpretation of the Voting Rights Act to require specific racial targets was not a widespread or common interpretation, but it did occur in North Carolina and Virginia. This Court's correction of that error in this case ultimately will assist those states to redraw their districts in a way that does

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[33] *Id.*

[34] The Department of Justice precleared the South Carolina State Senate Plan on November 14, 2011. Status of Statewide Redistricting Plans, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last accessed December 18, 2012).

not involve the excessive and mechanical use of race-based targets.

III. WHILE REDISTRICTING IS PRIMARILY THE RESPONSIBILITY OF LEGISLATURES, THE COURT MUST ACT WHEN DISTRICTS ARE BASED ON EXPLICIT RACIAL CLASSIFICATIONS

Asking this Court to enforce the constitutional equal protection guarantees that guard against unjustified race-based decision-making by a legislature is not "punishing" the state that is striving in good faith to comply with the Voting Rights Act, as the lower court in this case believed. *Alabama Legislative Black Caucus v. State of Alabama,* 989 F. Supp. 2d 1227, 2013 U.S. Dist. LEXIS 178735 at *230 (M.D. Ala. 2013). Rather, it is correcting a misunderstanding of governing legal standards that led to the imposition of racial targets in redistricting that were never intended by Congress. The crucial error made by the North Carolina General Assembly, and by the Alabama Legislature, was to conclude that the Voting Rights Act creates a requirement for majority-black districts without regard to recent progress in ameliorating the impact of racially polarized voting.

Instead, the task the North Carolina General Assembly faced when drawing new legislative and congressional districts was to assess where white bloc voting exists at levels high enough usually to defeat the candidate of choice of black voters. *Bartlett,* 556 U.S. at 24. In other words, majority-black districts are only necessary, as a temporary and remedial measure, after a searching inquiry revealing that black voters are consistently shut out

of the political process and a majority-black district is the only way black voters will have a fair opportunity to elect their candidates of choice. Whether under the Section 5 non-retrogression standard, or the Section 2 vote dilution standard, a deep and searching local inquiry of current practical realities has always been required. *See, e.g, Shelby Cnty. v. Holder,* 133 S. Ct. 2612, 2629 (2013) (VRA must be tied to current conditions); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) (vote dilution inquiry requires an "intensely local appraisal"); *Miller v. Johnson,* 515 U.S. 900, 922 (1995) (majority-black districts drawn to satisfy Section 5 of the VRA require strong basis in evidence of the harm being remedied); *Johnson v. DeGrandy,* 512 U.S. at 1000; *Gingles,* 478 U.S. at 45 ("the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process."). Where race-based targets are employed without regard to current conditions, the courts must intervene to guarantee the constitutional right of voters to equal protection of the laws.

CONCLUSION

For the reasons articulated above, and in order to continue the important progress that the Voting Rights Act was intended to foster, *amici* respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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Dated: August 20, 2014

AMICUS CURIAE BRIEF

Nos. 13-895 and 13-1138

In The Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *ET AL.*,
Appellants,

v.

ALABAMA, *ET AL.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *ET AL.*,
Appellants,

v.

ALABAMA, *ET AL.*,
Appellees.

On Appeal from the
United States District Court
for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE* DALTON J. OLDHAM IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

For the past 25 years, Dalton L. Oldham has represented individuals and several state and local governments in redistricting cases, both in defending state redistricting maps and in challenging redistricting maps. Mr. Oldham has spoken at numerous seminars and symposiums on redistricting, census and election law issues, National Conference of State Legislatures and American Bar Association. Mr. Oldham presented a paper at the Convention of the ABA on census adjustment and its potential effect on redistricting which was published together with other symposium papers in a volume titled: CENSUS 2000: CONSIDERATIONS AND STRATEGIES FOR STATE AND LOCAL GOVERNMENT (2000), Benjamin E. Griffith, (ed.). Mr. Oldham respectfully submits this brief in the hopes that his experience may elucidate some of the important issues raised by the parties.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or his counsel made a monetary contribution toward its preparation or submission. Counsel for the parties granted general consent to the filing of amicus briefs on July 10, 2014 and August 15, 2014 (No. 13-895) and July 10, 2014 and August 5, 2014 (No. 13-1138).

SUMMARY OF THE ARGUMENT

Appellants in this case propose a new legal standard for Section 2 of the Voting Rights Act. This legal standard would pervert the Voting Rights Act from a statute intended to allow minorities to have an equal opportunity to elect candidates of their choice, into a statute that requires the absolute maximization of minority voting strength through both the creation of majority-minority districts and a maximization of influence districts. This standard would essentially require that all jurisdictions intentionally gerrymander for the maximum benefit of the political party generally supported by the minority in question. Such a standard would be a radical departure from all previous legitimate redistricting practices. It comports with neither the text nor intent of the statute, nor this Court's prior precedent regarding the Voting Rights Act and, if it did, it would not comply with the United States Constitution.

Regardless of how the Court may ultimately decide this case, it is absolutely imperative that the Court make clear that it is in no way adopting or validating the new standard proposed by the Appellants in this case.

ARGUMENT

I. HOW APPELLANTS' NEW STANDARD WOULD OPERATE IN ALABAMA AND OTHER JURISDICTIONS

Appellants' new standard suggests that the Voting Rights Act requires that a jurisdiction when faced with redistricting majority-minority districts or districts that have significant minority components, i.e. minority influence districts, the jurisdiction is required by the Voting Rights Act to only place the minimum amount population in the districts as is necessary to bring the districts above -5% of the ideal district population. Alabama Legislative Black Caucus Brief at 6. Alabama Democratic Conference Brief at i. [2]

Furthermore the Appellants suggest that a jurisdiction is required to engage in extensive study to determine the minimum percentage necessary to elect a minority candidate of choice in a majority-minority district.

Fundamentally, Appellants' new standard is that the Voting Rights Act requires a jurisdiction to

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[2] *See also* Alabama Legislative Black Caucus brief at 15 27, 34, 45 and 9 n. 22. As well as the overall deviations of the alternative redistricting schemes proposed in the legislature by members of the Black Caucus *infra*. *See also* Alabama Democratic Conference Brief at i "this goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the state to stark racial intentionality in district drawing...". *See also* 16.

provide proportional or near proportional representation for minorities in a jurisdiction with the minimum minority population necessary to elect these preferred candidates of the minority communities choice.[3] This minimum minority population is to be achieved by both intentionally underpopulating the minority districts and by placing the minimum minority population percentage in those districts necessary to elect the preferred candidate of choice. This of course produces a substantial minority population which appellants propose must be used to maximize minorities influence in other districts.[4]

These influence districts would likewise be intentionally underpopulated. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004) (three-judge court) (sum. aff. *Cox v. Larios*, 542 U.S. 947 (2004)) is a crucial case because the facts before the district court in that case illustrated the actual power that population deviations under 10% can have if the population deviations can be manipulated to consistently provide an advantage to a specific group. A hypothetical is illustrative of the potential for mischief such a rule would create.

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[3] *See* Appellants' Alabama Legislative Black Caucus Brief at 61. *See also* Alabama Democratic Conference Brief at 10, 14, 32 -36

[4] Alabama Democratic Conference Brief at 2, 17-19, 33. *See also* Appellants' Alabama Legislative Black Caucus Brief at 9 which lists 8 influence districts (2 Senate, 6 House) "eliminated" by the state's redistricting plan. These districts had replacement versions in the Black Caucus' legislative alternatives listed infra.

Imagine a jurisdiction with 100,000 population and 100 districts with a 25% minority population. Theoretically you could evenly divide the districts between the majority population in the minority population by creating 75 districts of a thousand people each for the majority and 25 districts of a thousand people each for the minority. If you underpopulated the minority districts by 5%, each district would be composed of only 950 people, leaving 50 extra persons for each of the 25 districts requiring that the drafters of the map to locate the 1,250 extra minority voters to place in other districts. If the drafters so desired, under the theoretical 10% safe harbor, the drafters could underpopulate two more majority districts and place half of the 1250 extra minority voters in each of these two new underpopulated districts and have two 65% plus majority-minority districts. This extra population could also be placed in four or five so-called influence districts where, with a few allies, the minorities could elect candidates who are not the minority communities preferred choice and are not supported by the majority of the jurisdiction, but are of the same political party. This is why population deviation patterns, even when they are below 10%, matter. If you lower the minority percentage in each majority-minority district it has a similar effect. When this is done in the real world the geographic locations of the population prevent the kind of perfect homogeneous districts that were used above in order to keep the math simple and illustrate the point. However, this also means that in the real world there will be a significant minority population in many districts before any manipulation of deviation or population percentages takes place and

therefore more marginal manipulations can have far more material effects. When the two strategies are combined, as Appellants proposes here, then it is quite possible for a minority with only a few allies, that constitute far less than 50% of the voters, to control an elective body despite huge majorities voting against it.[5]

As the Alabama Legislative Black Caucus claims in its brief the:

> 2010 census revealed that the majority black districts were all underpopulated... the majority black senate districts on average were underpopulated by about 15% and the average majority black house district was underpopulated by about 16%.[6] The

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[5] This is exactly the racially driven deviation pattern employed by the Arizona Independent Redistricting Commission in Harris. *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014) (appeal docketed at *Harris v. Ariz. Indep. Redistricting Comm'n*, No. 14-232 (Aug. 28, 2014)

[6] *See Rodriguez v. Pataki*, 308 F.Supp.2d 346, (S.D.N.Y. 2004) (sum. aff. *Rodriguez v. Pataki*, 543 U.S. 997 (2004) (where patterns of deviation over-populate slow growth areas and under- populate fast growth areas, the pattern of deviation is not discriminatory.) Given that the majority-minority districts in Alabama are located in the central urban cores and rural areas of the state and that these areas have grown in the past two decades at a slower rate than the rest of the state and can reasonably be anticipated to do so in the next decade, the legislature of Alabama could have had a legitimate basis for intentionally over-populating the majority- minority districts. Because of the fact pattern mentioned in

> minimum number of additional people who would have to be added to each district turned in part on how much the legislature decided to permit a district to depart from the ideal size. In prior redistricting, Alabama had required districts to be within 5% of the size of an ideal district. In designing the post 2010 census districting plan, however, the framers decided instead to permit a deviation of only 1%. That decision significantly increased the number of additional individuals who would have to be added to an underpopulated district.

Alabama Legislative Black Caucus Br. at 6

As illustrated by Appellee's brief, the differences in the minority percentages in the majority-minority districts in the redistricting schemes proposed by African-American legislators for the 2014 election are not significantly different from the percentages in the enacted plan. Some districts are higher in the enacted plan and some districts are lower in the enacted plan. The principal complaint of Appellants' is that the State of Alabama "African-Americans in the majority-minority districts" and because these African-Americans were supposedly "packed" there was insufficient minority population to be placed in other districts where

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appellee's brief, most of the majority- minority districts have less population at this point in the decade than most other districts around the state. In view of this fact and this Court's summary affirmance of *Pataki*, the state's policy of equalizing the populations between districts is both legitimate and rational.

although candidates of the minority community's choice could not be elected non-Hispanic white Democrat candidates could be elected.[7] So if the differences in percentages are not creating the excess minority population necessary to fill these influence districts, how are the plans produced by Legislative Black Caucus able to do this? The answer is through manipulation of population deviation. None of the Appellants' plans actually meets the plus or minus 1% deviation standard adopted by the Alabama Legislature and they skew the population deviations to the benefit of the majority-minority and influence districts. This point is implicit in the question presented in the Alabama Democratic Conference brief "this goal, *particularly when combined with the new goal of significantly reducing population deviation among districts,* led the state to stark racial intentionality in district-drawing, packing more super majorities of black voters into already majority black districts..."[8] The Appellants themselves recognized in this statement that they could not achieve the results that Appellants sought—proportional representation in majority black districts and a maximization of black influence in as many remaining districts as possible—without intentional racially-based manipulation of the population deviation. Moreover the alternative redistricting schemes introduced into the Legislature by the Black Caucus illustrate the problem the two House of Representatives proposals at overall ranges of deviation of 10.00 and 9.96 percent. The two Senate alternatives were 9.69 and

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[7] *See* brief of Alabama Legislative Black Caucus at 9.

[8] *See* brief of Alabama Democratic Conference at i (emphasis added).

9.58 percent.[9] If the Alabama Legislative Black Caucus had been serious in its concern about the black voting age population percentage in each district as opposed to creating a map intended to maximize black influence as well as maximize the number of Democrats in the legislature, they would have drawn a map that complied with the plus or minus 1% population standard. As a result the alternative maps introduced in the Legislature proved little in appellants' case.

II. THE COURT'S PRECEDENT PREVENTS THE INTENTIONAL RACIAL MANIPULATION OF POPULATION DEVIATION IN ORDER TO FEED MINORITY INFLUENCE DISTRICTS THAT APPELLANTS SUGGEST ARE REQUIRED BY THE VOTING RIGHTS ACT.

In *Roman v. Sincock*, 377 U.S. 695, 710 (1964), this Court declared that the one person,one vote rule requires a court to:

> Ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur because of certain factors that are free

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[9] The McClammy House Alternative when stated in two digits past the decimal point rounds to 10% however it is actually a mere four people short. The Reed-Buskey House Alternative 4 had an overall range of deviation of 9.96%. Reed-Buskey Senate 2 was only slightly better, 9.69% and the Sanders Plan was 9.58%.

> from any taint of arbitrariness or discrimination "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote "includes the right to have the vote counted at full value without dilution or discount." *Id.* at 555 n.29 (quoting with approval *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). Further:
>
> The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381 (1963). *See also Baker v. Carr*, 369 U.S. 186 (1962)

These cases state the undeniable theme that population equality in redistricting should be encouraged. This principle currently culminates in the decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004) (three-judge court) (sum. aff. *Cox v. Larios*, 542 U.S. 947 (2004) which established that if plaintiffs could prove a discriminatory pattern of population deviations, even if the overall range was less than 10%, and plaintiffs could prove, at the very least, that these population deviations did not come from any legitimate consistently applied rational state policy, then plaintiffs could state a violation of

the 14th Amendment's Equal Protection Clause for the violation of the one-person, one-vote principle.

In *Larios* the plaintiffs cited four reasons for the intentionally invidious discriminatory pattern of population deviations. One reason was that partisan politics created the discriminatory pattern of population deviations; the second reason was that regionalism drove the discriminatory pattern of population deviations; the third reason was that a bias in favor of the slow growth areas of the state as opposed to the fast growth areas of the state motivated the discriminatory pattern of population deviations; the fourth claim was that race was the reason for the discriminatory pattern of population deviations, which was styled as a racial gerrymandering claim and so described by the *Larios* court. *See generally Larios*, 300 F. Supp. 2d at 1325-31.

The reason the plaintiffs made all four of these claims was that there were districts which were exceptions to each of the four patterns, however each district that was an exception fell into one of the other three categories in the complaint. For instance there were districts in the South Georgia which were overpopulated but they were held by Republicans. *Id.* at 1326. There were other districts held by Republicans that were underpopulated but they would be in one of the slow growth areas. *Id.* The areas of inner-city Atlanta and South Georgia also correspond with most of the minority population in Georgia. *Id.* By including all four motivations there were no underpopulated or overpopulated districts that were not explained by the compliant.

The plaintiffs in their complaint in *Larios* asserted that race was as improper a motivation for the type of intentional discriminatory pattern of population deviation as was discrimination based on partisanship, regionalism, and discrimination against fast growth and slow growth areas. The court in *Larios* chose not to decide this race claim since it had already found for the plaintiffs based on other motivations. While the State of Georgia did not attempt the bold assertion that Appellants make in this case that an intentional racially motivated discriminatory pattern of deviation is required by the Voting Rights Act, the State of Georgia did assert that its motivations, including the racial ones, were legitimate rational state policies if the population deviations were kept below an overall range of deviation of 10%. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1339-40 (N.D. Ga. 2004). The similarity of the racial fact patterns is undeniable, clearly if race can be a legitimate rational state policy if the population deviation is below an overall range of 10% then the similarity of the racial fact patterns between *Larios* and in what Appellants propose in this case would implicitly, if not directly, overrule this important case.

Larios v. Cox has been a seminal case in the 2010 redistricting cycle. Many jurisdictions have adopted criteria and drawn their redistricting maps in order to comply with the principles enunciated in *Larios*. Even more jurisdictions have rejected redistricting maps proposed by minority organizations, minority caucuses and Democratic party groups which intentionally underpopulated majority minority or heavily minority districts in

order to use reliable minority voters to shore up non-Hispanic white Democratic candidates based upon the principles enunciated in *Larios*.[10] The advocates for these redistricting maps which intentionally underpopulate districts based on race and ethnicity has been that they are either required by Section 5 or Section 2 of the Voting Rights Act.

Despite these assertions the Department of Justice has refused to interpret the Voting Rights Act to require such population deviations. The Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5. In its *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, which explicitly "is not legally binding," the Department of Justice stated: "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*; *Notice*, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The Department has also acknowledged the obvious, that compliance with constitutional equal population requirements could

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[10] *Cf. Harris v. Arizona Independent Redistricting Commission*, No. 14-232, currently on appeal to this Court, where the Arizona redistricting commission intentionally underpopulated the districts with significant minority components claiming this was necessary in order to comply with the Voting Rights Act. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1090-91 (D. Ariz. 2014) (Wake, J., dissenting). The conduct of the Arizona Independent Redistricting Commission is exactly the type of conduct appellants seek to require in Alabama.

result in unavoidable retrogression. Long ago the Department stated:

> Similarly, in the redistricting context, there may be instances *occasioned by demographic changes* in which reductions of minority percentages in single-member districts are unavoidable, even though "retrogressive," *i.e.*, districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength.

Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987) (emphasis added). The current guidance is to the same effect. 76 Fed. Reg. at 7472. This concession to demographic change, where it happens, is dictated by the text of Section 5 itself, which does not forbid all retrogression in the minority's "ability to elect their preferred candidates of choice" Rather, to deny preclearance the text also requires that the retrogression be "on account of race or color or in contravention of the [language] guarantees." The "on account of" language was necessary to keep Section 5 validly within Congress's enforcement power. But whether or not it is constitutionally necessary, it is there. Retrogression because of relative population changes is not on account of race or language.

Furthermore, nothing in the text of the Voting Rights Act purports to require or authorize population inequality in legislative districting, directly or by implication. *See* 52 U.S.C. § 10304(a).

Section 17 of the Voting Rights Act forbids it in sweeping terms:

> Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.[11]

Also the decisions of this Court would appear to incorporate the one person, one vote principle into its basic understanding of the requirements for a majority minority district required by the voting rights act. In *Thornburg v. Gingles* this Court stated that in order to state a claim under Section 2 of the Voting Rights Act "the minority group must be able to demonstrate that it is *sufficiently large* and geographically compact to constitute a majority in a single-member district." [12] sufficiently large can have no reasonable meaning other than as an intrinsic requirement under the voting rights act that any remedial district must meet the requirements of the 14th amendment equal protection clause's one person one vote principle. Justice Kennedy in his decision for the court and *LULAC v. Perry*[13] announced an analogous principle regarding compactness. In that case he made it clear that a district that was not sufficiently compact could not be deemed a district drawn in compliance with the voting rights act and therefore could not be counted

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[11] 52 U.S.C. §10311

[12] 478 U.S. 30, 50 (1986) (emphasis added; citations omitted)

[13] *League of Latin American Citizens(LULAC) v. Perry,* 548 U.S. 399 (2006)

toward proportional representation. The principle is even more applicable here because the one person, one vote requirement unlike the compactness requirement comes directly from the 14th amendment's Equal Protection Clause, whereas the Voting Rights Act is a statutory gloss on the exact same clause. Essentially the Voting Rights Act does not cause the Equal Protection Clause to be at war with itself. It also opens a Pandora's box.

If it is the case that one person, one vote does not apply to racially and ethnically drawn Voting Rights Act districts and it is to be treated as a federally required neutral redistricting criteria such as county and city lines then the obvious question becomes why stop at an overall range of 10%? In *Mahan v Howell*, 410 U.S. 315 (1973), this Court made clear that if a legitimate rational state policy is consistently applied, the deviations could constitute an overall range as high as 16.25%. The one thing that cannot be argued is the application of the racially and ethnically-based deviation will be *very consistent* since its purpose is to maximize both the racial/ethnic voting strength and in almost all cases Democratic party performance. This will become standard practice in all Democrat controlled jurisdictions and there may well be litigation to enforce it as a requirement in others.

Furthermore, the Constitution does not grant Congress power to enact legislation requiring or permitting population inequality among voting districts. The Fourteenth and Fifteenth Amendments grant Congress power to enforce by "appropriate legislation," which must be "plainly

adapted" to the end of enforcing equal protection of the laws or preventing abridgement of the right to vote on account of race, consistent with "the letter and spirit of the constitution." *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966). [14]

An intentional racial or ethnic pattern of deviation would constitute an impermissible use of race in the same manner as *Shaw v. Reno* and its progeny.[15] By definition the selection of under and overpopulated districts would be based predominantly on race and implicates the exact same harm identified in the *Shaw* cases and their progeny, the stereotyping of the races. However, in the case of population deviations, unlike any of the Shaw cases or its progeny, there is the actual individualized harm of vote dilution occurring to all the voters in the overpopulated districts. This actually implicates the discussion in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (*UJO*), where this Court suggested that if a jurisdiction by putatively complying with the voting rights act diluted the vote of voters who were not being protected by the voting rights act then the jurisdiction would not be required by the

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[14] Many of these exact same issues are presented in the *Harris v. Arizona Independent Redistricting Commission*, No. 14-232 (docketed Aug. 28, 2014) and is discussed by Judge Wake's dissent. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1102-06 (D. Ariz. 2014) (Wake, J., dissenting)

[15] 509 U.S. 630 (1993) (*Shaw I*); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900 (1995); *Abrams* v. *Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996)

voting rights act to take that action and if they did the voters who were diluted would have a 14th amendment cause of action. Even though Justice Stevens dissented in *Shaw v. Reno* and all of its progeny he was quite clear that the situation in the UJO hypothetical would in fact state a 14th amendment cause of action.[16]. If the voting rights act permits otherwise unconstitutional numerical vote dilution, then it exceeds Congress's power to enforce the Fourteenth and Fifteenth Amendments' commands of equal voting rights.

Finally, intentional racial or ethnic manipulation of population deviations implicates exactly the same policy concern which this Court correctly alluded to in *Bartlett v. Strickland* when it said "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (Kennedy, J.); *see also Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). That interpretation would result in a substantial increase in the number of mandatory districts drawn with race as "the predominant factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916(1995). The only difference would be that intentional racial or ethnic manipulation of population deviations will implicate a far greater number of districts, because of the large number of districts which will have to be overpopulated far from the geographic area that actually caused the problem, and create more vote dilution than the creation of crossover or influence districts even though influence and crossover

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[16] *Shaw I* 509 U.S. at 678.

districts will be the ultimate goal of the intentional population deviations manipulation. As is the case for the intentional manipulation of the population deviations based on race and ethnicity Appellants' suggestion that crossover or influence districts are required by the Voting Rights Act is also antithetical to this Court for our precedents as well as the intent and text of the act.

III. THE VOTING RIGHTS ACT DOES NOT REQUIRE THE CREATION OF INFLUENCE OR CROSSOVER DISTRICTS

This is not the first time that this Court has reviewed a version of Appellants' legal theory. In *Voinovich v. Quilter,* the Court faced exactly this type of claim.[17] The Democrats claimed that "the plan [drawn by Republicans] packed black voters by creating districts in which they would constitute a disproportionately large majority," thereby violating §2 of the Voting Rights Act. *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993). In the Democrats' view, "the plan should have created a larger number of influence districts -- districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice [i.e. NHW Democrats]." *Id.* at 149-50 The District Court found for the NHW Democrat plaintiffs; however this Court in a unanimous opinion reversed.

The Court refused to decide "whether influence dilution claims such as appellees' are

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[17] 507 U.S. 146 (1993)

viable under section 2."[18] The court noted that this case did not involve the usual vote dilution claims of "fragmentation of a minority group" (cracking) or that "Ohio's creation of majority black districts prevented black voters from constituting a majority in additional districts." (packing)[19] However, the Court did say that while the "first *Gingles* precondition—the requirement that the group be sufficiently large to constitute a majority in a single member district, would have to be modified," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), — the other two preconditions would definitely apply if an influence claim were actionable.[20] The Court then noted that it was necessary for the plaintiffs' argument to assert "coalitional voting between whites and blacks" and that black interests could be adequately represented from "districts with only a 35% black population."[21] The Court used these factual concessions to find that plaintiffs failed to prove the polarized voting requirements of the *Gingles* preconditions.[22]

It appeared as a result of *Voinovich,* the argument that the failure to maximize NHW Democrat districts violates §2 was dead since, factually, the proof of polarized voting would necessarily defeat the argument that minorities could be adequately represented at such low

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[18] *Id* at 154.

[19] *Id* at 153.

[20] *Id* at 158.

[21] *Id* at 151-152. The choice of 35 percent is significant because it is in the range of the quota of black vote typically needed to draw a safe white Democrat district.

[22] *Id* at 158.

percentages and, conversely, the lack of polarized voting prevents the invocation of the protections of §2 of the Voting Rights Act. Ironically, this is exactly what the federal district court did in New Jersey.[23] Despite this, Democrats persisted with this theory which they pressed forward in the *LULAC* case. Justice Kennedy disposed of this theory in the exact same manner as had been done in *Voinovich*.[24]

Democrat proponents persisted with this legal theory and as a result this Court was forced to deal with the question of whether influence districts were a viable cause of action under §2 of the Voting Rights Act. In *Bartlett v. Strickland*,[25] a five to four decision, Justice Kennedy, writing for the Court, forcefully said that in order to state a claim for vote dilution under §2 a plaintiff must assert that a reasonably compact majority-minority district can be drawn in the area in question. Section 2 does not require the construction of influence districts.

Likewise, this would appear to be inconsistent with the requirements of the 2006 reauthorization of §5 of the voting rights act. By adopting these amendments, Congress legislatively reversed the United States Supreme Court's decision in *Bossier II* and any portion of *Ashcroft* allowing states to prefer coalition or influence districts over districts that allow minorities to elect their preferred candidates of choice. In so doing, Congress endorsed many of the arguments advanced by Justice Souter in the dissenting opinion *in Ashcroft*. *See* Report of the

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[23] *Page v Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).
[24] *LULAC* at 443.
[25] 556 U.S. 1 (2009)

Senate Committee on the Judiciary, 109th Cong. Report 295, pp. 16-18 (hereinafter Senate Report) ("Any Discriminatory Purpose") and pp. 18-21 ("Preferred Candidate of Choice"); Report of the House Committee on the Judiciary, 109th Cong. Report 478 pp. 65-72. By expanding the statutory definition of "discriminatory purpose," Congress incorporated into § 5 the constitutional standard established in cases such as *Mobile v. Bolden,* 446 U.S. 55 (1980) *Washington* v. *Davis,* 426 U.S. 229 (1976) Senate Report p. 16, and *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977) *("Village of Arlington Heights"). See* House Report, pp. 66-68. Consistent with this intent, the Senate Report cautioned that:

> [S]ome witnesses raised concerns that the amendment could be misinterpreted, and that the Justice Department or Federal Courts might compel the creation of so-called influence or coalition districts. The adopted language does not prevent state officials from declining to combine a group of minority voters with a group of white voters who tend to support the same parties and candidates in a district where candidates supported by minorities will reliably prevail. Although such an action may make it more difficult for that coalition of voters to elect their preferred candidate, *the Voting Rights Act . . is not designed to protect political parties, or to prevent statewide political realignment from being reflected in the redistricting process. Nor can any racial or political group claim a right under the*

> *Fourteenth Amendment to have its members placed as often as possible in districts where candidates of the party favored by that group's members will prevail . . . .*
>
> The language "any discriminatory purpose" does not permit a finding of discriminatory purpose based on a determination that the plan seeks partisan advantage , . or protects incumbents.

Senate Report pp. 18 (emphasis added).

Both the Senate and the House reports explain that amended § 5 is designed to prevent elected officials from "unpacking" majority-minority districts and changing them into "influence" or "coalition" districts. *See, e.g.*, Senate Report p. 19; House Report pp. 68-71. Amended § 5 does not "lock into place coalition or influence districts" or "the competitive position of a political party." Senate Report p. 21. Congress "explicitly reject[ed] all that logically follows from Justice O'Connor's statement [in *Ashcroft*]" that state legislatures "should not focus solely on the comparative ability of a minority groups to elect a candidate of choice." House Report p. 71. Instead, under the § 5 effects test, as amended, "the relevant analysis . . . is a comparison between the minority community's ability to elect their preferred candidate of choice before and after a voting change." *Id.*

In summary, following the 2006 reauthorization of § 5, it remains settled that a jurisdiction could lawfully enact redistricting plans

that increase the number of districts that allow a minority group to elect their preferred candidates of choice. Preclearance will now be denied if a redistricting plan has any discriminatory purpose. A discriminatory purpose may be established if a plan intentionally fails to create districts that allow minority voters to elect their preferred candidates of choice. Federal Register, Vol. 76, No. 27 p. 7471 (February 9, 2011) (citing *Busbee v. Smith,* 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983), *Garza and United States v. County of Los Angeles,* 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring and dissenting in part), *cert. denied,* 498 U. S . 1028 (1991)).

Discriminatory purpose is not established because a jurisdiction refuses to create "coalition" or "influence" districts or because a new redistricting plan realigns political power within a state. Jurisdictions may not substitute coalition or influence districts, supported by incumbents or the party favored by minorities, for districts that allow minority voters to elect their candidates of choice. Instead, under the "effect" clause, whether an objection will be made depends upon whether a new plan reduces the number of districts that allow minorities to elect their preferred candidates as compared to the benchmark.

In short, neither Section 2 nor Section 5 of the Voting Rights Act has required the creation of crossover or influence districts nor does the voting rights act require an intentional racial or ethnic manipulation of population deviations in order to maximize either minority districts or influence.

Indeed since Republican votes were critical at each stage of the passage of the voting rights act it would seem extremely odd that the act was intended as a statutory requirement for a perpetual Democratic gerrymander. Such an interpretation stretches all credulity. Furthermore such statutory interpretation would create an unnecessary constitutional doubt which the Court's standards of statutory interpretation required to be avoided.[26] The Court should be sensitive to the fact that African-Americans in Alabama faced no vote dilution as a result of this redistricting plan. Because the harm under the *Shaw v. Reno* standard is racial stereotyping[27] and not vote dilution the court needs

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[26] *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (*citing NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt").

[27] 509 U.S. 630 (1993). *Shaw* is often viewed by the press as part of the Supreme Court's "reverse discrimination" line of cases. O'Connor specifically disclaims this, noting

to take care that appellants, governmental jurisdictions and lower courts do not take any decision by this court in this case as carte blanche or

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that "appellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength." *Id* at 641. In fact, she uses this point to distinguish *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (*UJO*). *Id* at 651-52. The factual difference between vote dilution cases, the *Shaw* line of cases, and all of the "reverse discrimination" cases is the harm. All of the reverse discrimination cases have involved admissions or selection, employment, or contracting where specific plaintiffs or groups of plaintiffs were directly injured by the racial classification. Vote dilution cases of all types have relied on the concept that one group of voters ballots are made more powerful than another group's ballots because of the structure of the election system. If this is the harm which constitutes a Fourteenth Amendment violation (as was asserted by the plaintiffs in *UJO*) then none of the so-called "black maximization" redistricting plans of the 1990s redistricting cycle could constitute dilution of white voting strength since none of the so called "black maximization" plans ever reached proportional representation. Essentially, white voters even under the most aggressive "black maximization" plans retained a disproportionate share of the electoral power. Therefore, Justice O'Connor identifies the harm as a general societal one that "reinforces societal stereotypes". Despite the Court's denial that this is a "reverse discrimination" case, a term the court has disclaimed before because the Court declares it simply to be discrimination no matter the identity of the group discriminated against; it is clear. given the citations to *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that the "reverse discrimination" line of cases has informed the Court's thinking in the *Shaw* line of cases.

even a requirement to engage in real vote dilution against the majority of the voters in numerous jurisdictions across the country as a result an explicit rejection of appellants theory of the case is necessary in order to avoid a far greater harm.

CONCLUSION

As a result, this Court should explicitly reaffirm that a jurisdiction has the right to improve population equality if it chooses to do so and that the Voting Rights Act cannot be used as an excuse for increasing population deviations. Furthermore, the Court should reaffirm its prior holdings that the Voting Rights Act does not require or protect crossover influence districts.

Respectfully submitted,

October 16, 2014

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AMICUS CURIAE BRIEF

Nos. 13-895, 13-1138

In the

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,
Appellants,

v.

ALABAMA, et al.,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, et al.,
Appellants,

v.

THE STATE OF ALABAMA, et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the plaintiffs proved that Alabama's legislative redistricting plans for the House and Senate unconstitutionally classify black voters by race on a statewide basis, even though they did not show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Appellees, the State of Alabama, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to these cases. *See, e.g.*, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980). PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

immigration and assimilation. CEO supports color-blind public policies, and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Shelby County*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193; *Bartlett*, 556 U.S. 1; and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during hearings on the 2006 reauthorization of the Voting Rights Act.

Project 21, the national leadership network of black conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in *Shelby County*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193; and *Bartlett*, 556 U.S. 1. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 2 and Section 5 of the Voting Rights Act. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases concern the interplay between this Court's racial gerrymandering cases, Section 5 of the Voting Rights Act, and the Equal Protection Clause. The first permits consideration of race in redistricting, the second requires it,[2] and the third forbids it. Prior to *Shelby County*, 133 S. Ct. 2612, Alabama was subject to Section 5 of the Voting Rights Act of 1965 (Section 5), 52 U.S.C. § 10304, which required the state to obtain preclearance from the Department of Justice or the United States District Court for the District of Columbia before any new "standard, practice, or procedure with respect to voting" could go into effect. Under Section 5, legislative district lines would not be precleared unless the state could prove they would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting *Beer*, 425 U.S. at 141).

After the 2010 Census,[3] the Alabama Legislature hired an expert to help draw district lines that complied with Section 5. *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1244 (M.D. Ala. 2013). The expert considered many factors; in

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[2] As explained below, the non-retrogression principle from *Beer v. United States*, 425 U.S. 130, 141 (1976), requires states to consider race in order to comply with Section 5 of the Voting Rights Act.

[3] After each decennial census, the Alabama Constitution requires the state legislature to "fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them." Ala. Const. art. IX, § 199.

particular, the Legislature requested that the population deviation among districts be only one percent, as opposed to the five percent guideline used in prior redistricting cycles.[4] *Id.* at 1245. The purpose of the one percent guideline was to comply with the constitutional one-person, one-vote requirement of *Reynolds v. Sims*, 377 U.S. 533 (1964), especially in light of a recent case that cast doubt on the ability of states to use a five percent deviation as a "safe harbor" for compliance.[5] *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245-46 (citing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)). The Legislature also instructed the expert to consider traditional redistricting criteria such that district lines "be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest." *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245. Of course, because of Alabama's status as a covered jurisdiction under Section 5, the expert was also required to consider the racial makeup of resultant districts in order to ensure that there was no "retrogression" in the position of African-American voters.

After the redistricting plans were signed into law, Plaintiffs challenged them on the grounds that they were unconstitutional racial gerrymanders under the Fourteenth Amendment and unlawfully diluted the voting strength of African-Americans in violation of Section 2 of the Voting Rights Act (Section 2), 52

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[4] The population of each district must be within one percent, above or below, the population of the state's mean district.

[5] Several states adopted a one percent deviation guideline during the 2010 round of redistricting. *See id.* at 1246.

U.S.C. § 10301. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1237. The district court rejected both claims. *Id.* at 1312. The court held that, assuming Plaintiffs had standing, the plans were not an unconstitutional racial gerrymander because race was not the "predominant factor motivating the decision of the Legislature." *Id.* at 1293. "Although race was a factor in the creation of the districts," it was just one of many alongside compliance with one-person, one-vote and other traditional districting criteria. *Id.* at 1293-96. Thus, under prevailing Supreme Court precedent, it was unnecessary to apply strict scrutiny. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 658 (1993); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). In the alternative, however, the district court held that even if race was the predominant factor in the redistricting decisions, the Legislature's use of race was constitutional because it was narrowly tailored to comply with Section 5. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1306-12.

The district court correctly applied existing precedent; under *Shaw* and its progeny, redistricting acts which consider race as just one of many factors do not violate the Equal Protection Clause. However, *Shaw* is inconsistent with this Court's more recent equal protection jurisprudence mandating strict scrutiny whenever race is *any* factor in an official decision. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (holding that strict scrutiny applies whenever the state "considers" race); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 741 (2007) (same); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local

governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Accordingly, this Court should extend its decision in *Shaw* to explain that any redistricting decision should be required to satisfy strict scrutiny upon a judicial determination that the Legislature used race as a factor in drawing district lines. Although application of strict scrutiny is nearly always fatal, in this case the Alabama Legislature considered race only to the extent necessary to satisfy the United States and Alabama Constitutions. The judgment below should be affirmed on that limited basis.

ARGUMENT

I

THE COURT SHOULD AFFIRM THE JUDGMENT BELOW ON THE NARROW GROUNDS THAT ALABAMA'S USE OF RACE WAS NECESSARY TO REDISTRICT IN COMPLIANCE WITH ONE-PERSON, ONE-VOTE AND THE STATE CONSTITUTION

The lower court's judgment in favor of Alabama on Plaintiffs' racial gerrymandering claims should be affirmed because the Legislature's consideration of race was limited to ensuring it was able to comply with the United States and Alabama Constitutions. The Alabama Constitution requires the state to redistrict every ten years. Ala. Const. art. IX, § 199. In 2010—when the state needed to redistrict—Alabama was subject to Section 5 preclearance, so in order to ensure that the new district lines did not cause "retrogression," the Alabama Legislature was required to consider the race of the resulting districts. Put

simply, before this Court's decision in *Shelby County*, 133 S. Ct. 2612, ensuring that the new district lines would not lead to retrogression of black voters was a condition precedent for lawfully adopting a redistricting plan in Alabama. Alabama's consideration of race was limited to satisfying its constitutional obligation to redistrict, as it was then understood.

Alabama's limited consideration of race to comply with Section 5 was in effect the *only* means Alabama could have used to satisfy its constitutional requirement to redistrict. The district court correctly concluded that the redistricting plan only used race as required by Section 5 because "[t]he more stringent version of section 5 that Congress enacted in 2006 required the Legislature to maintain, where feasible, the existing number of majority-black districts and not substantially reduce the relative percentages of black voters in those districts." *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1311. Because Alabama's consideration of race was required by Section 5, the redistricting acts were necessarily narrowly tailored to ensuring the state was able to comply with the Alabama Constitution.

Moreover, Alabama was also required to redistrict in order to comply with the federal Constitution. Section 2 of the Fourteenth Amendment, which abolished the Three-Fifths Clause, provides that "[r]epresentatives shall be apportioned among the several States according to their respective numbers." U.S. Const. amend. XIV, § 2. The Equal Protection Clause includes a "one-person, one-vote" requirement that requires state legislatures to, "as nearly as is practicable," balance legislative districts by population. *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Wesberry v.*

Sanders, 376 U.S. 1, 7-8 (1964); *Reynolds*, 377 U.S. at 568. There is no dispute that Alabama would have been in violation of the one-person, one-vote principle had it failed to redistrict according to its constitutional mandate after the 2010 Census. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1241. Therefore, it follows that Alabama needed to redistrict in order to satisfy both the Fourteenth and Fifteenth Amendments.

The dissent below errs in its claim that the redistricting plan was not narrowly tailored because a plan that permitted greater deviations in district populations would have resulted in fewer minority voters being shifted into new districts. *See id.* at 1315 & n.2 (Thompson, J., dissenting). The Legislature's decision to adopt a one percent deviation was not racially motivated; as noted above, Alabama would have been in violation of one-person, one-vote had it failed to redistrict after the 2010 Census. *See id.* at 1241 (majority opinion). Because of the large population disparities between districts—owing to prior redistricting plans[6] and natural population shifts—compliance with the one percent guideline required significant changes in district lines. Thus, the selection of a one percent standard was race-neutral; its purpose was to bring Alabama into compliance with the Constitution's one-person, one-vote requirement. *Id.* at 1293 ("[T]he main priority of the Legislature was

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[6] The prior district lines created by a Democrat-dominated legislature contained stark racial disparities. For example, the district court found that at the time of the 2010 Census, 25 of the 27 majority-black districts were underpopulated by more than five percent and nine by more than 20 percent. *Id.* By contrast, one majority-white district was overpopulated by over 60 percent. *Id.*

to comply with the constitutional mandate of one person, one vote.").

Absent a showing that the Legislature's intent in complying with *Reynolds* was discriminatory, it is irrelevant that the *impact* of the decision was to change the district designations of more black citizens than white citizens. *See Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (disparate impact, standing alone, is not sufficient to show a violation of the Equal Protection Clause). Here, the evidence shows that race was considered only to the extent necessary to comply with the Voting Rights Act. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245. And where there is no evidence that complying with *Reynolds* was racially motivated, the impact of that decision should not be strictly scrutinized.

While the Legislature may have been able to comply with *Reynolds* with somewhat less dramatic district line shifts, it does not follow that race motivated the decision to choose a one percent guideline. "[T]he overriding objective [of apportionent] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579. Alabama should not be penalized for attempting to come as close as possible to population equality while also complying with the Voting Rights Act.[7] The final

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[7] This is especially true because *Larios* cast doubt on the idea that a state is immune from a one-person, one-vote challenge when the population disparity does not exceed ten percent in any district. The *Larios* Court summarily affirmed the district court's finding that one-person, one-vote was violated even where all population

(continued...)

approved district lines complied with the one percent guideline and, in turn, the Constitution's one-person, one-vote requirement. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1256.

Given this Court's decision in *Shelby County*, the situation presented to Alabama in this case is unlikely to recur. No state is currently subject to Section 5 preclearance, and therefore no state must consider race to safeguard against claims of retrogression. Here, however, Alabama was required to consider race to ensure that it was able to satisfy its constitutional obligation to redistrict every ten years and to remain compliant with the Constitution's one-person, one-vote principle. Because compliance with Section 5's race-conscious mandate was necessary to accomplish these compelling interests, Alabama's limited use of race satisfies strict scrutiny. The decision below should be affirmed on this limited basis.

II

STRICT SCRUTINY SHOULD APPLY WHENEVER THE GOVERNMENT MAKES A RACE-BASED DECISION

Although the judgment in these cases should be affirmed because of the specific difficulties presented by Alabama's former coverage under Section 5, the larger issue is the scope of review required where, as here, it is shown that race was a factor in a

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[7] (...continued)
deviations were less than five percent from the mean district. *See* 542 U.S. at 947; *id.* at 951 (Scalia, J., dissenting) (discussing the lower court's findings). In light of *Larios*, Alabama's decision to reduce population disparities to less than one percent was quite sensible.

redistricting decision. Constrained by this Court's decisions in *Shaw*, 509 U.S. at 658, and *Hunt*, 526 U.S. at 547, the court below held that strict scrutiny only applies where race was the "predominant factor" in the Legislature's redistricting decision. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293. This case provides a good vehicle for the Court to extend *Shaw* and *Hunt*. This Court should make clear that whenever a state actor makes race a factor in an official decision—whether contracting, education, or redistricting—the action is unconstitutional unless it is the least restrictive means of furthering a compelling governmental interest. *See Adarand*, 515 U.S. at 227; *Fisher*, 133 S. Ct. at 2418-19.

The *Shaw* Court held that strict scrutiny is required when a redistricting scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." 509 U.S. at 658; *see also Hunt*, 526 U.S. at 547 ("[S]trict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision."). To establish a racial gerrymandering claim, a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Hunt*, 526 U.S. at 547 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). If the plaintiff can prove that race was the predominant factor, the redistricting legislation will be subjected to strict scrutiny; if not, it will generally be sustained. *See id.*

Permitting race-based redistricting decisions without strict scrutiny is inconsistent with this Court's understanding of the Equal Protection Clause in other contexts. *See* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. Pitt. L. Rev. 1, 18 (2010) ("The Supreme Court is much quicker to apply strict scrutiny to affirmative action cases than it is to racial redistricting cases."). This Court has repeatedly held that "all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized." *Hunt*, 526 U.S. at 546; *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting *Adarand*, 515 U.S. at 227)). It is irrelevant whether the government's motives are pure or malevolent; all government action that classifies citizens on the basis of race is inherently suspect. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Fisher*, 133 S. Ct. at 2430 (Thomas, J., concurring). Even a showing that race was but one of many factors is insufficient to avoid strict scrutiny. *See Grutter*, 539 U.S. at 326 (applying strict scrutiny to admissions policy that considered race as one of many factors); *Fisher*, 133 S. Ct. at 2415 (majority opinion) (same). Similarly, in the redistricting context, it should be no answer to say that the Legislature only slightly considered race, or that it placed other factors ahead of racial considerations. Any consideration of race by a governmental body must be subjected to strict scrutiny.

A. Federal Courts Are Able to Determine When a Government Entity Makes a Decision "Because Of" Race

The Court has permitted redistricting legislation to avoid the most searching level of judicial scrutiny, even where a state admits that race played a role in its official decisionmaking. This aberration appears to be partly the result of the inherent difficulty in distinguishing between mere consciousness or awareness of race and racially motivated legislation. Indeed, this Court has recognized that legislative actors—and most everyone else in our society—will be aware of race when making decisions with legal implications. *See Shaw*, 509 U.S. at 646. But this Court has also clarified that mere race awareness "does not lead inevitably to impermissible race discrimination." *Id.*

A discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). While it is true that many legislative decisions are made with knowledge of race, it does not follow that race was a factor in these decisions. Such reasoning would invalidate nearly every voting regulation. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Courts are in the best position to make the factual findings necessary to determine when official action is

made *because of* race.[8] Reapportionment statutes should not be exempt from the same exacting scrutiny given to all other race-based classifications simply because the line between race-awareness and race-consciousness may be difficult to ascertain. It is possible to be aware of race and at the same time act in a race-neutral manner, and in such cases, the actions of legislatures should stand, regardless of the impact the decision has upon racial groups. *See Davis*, 426 U.S. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). It is only when racial considerations motivate a decisionmaker that the decision should be examined closely in order to

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[8] The *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* inquiry into legislative motive is an exception to the general rule that an otherwise constitutional statute will not be struck down "on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Indeed, even the *Arlington Heights* Court recognized that questioning legislative motivation represents a "substantial [judicial] intrusion into the workings of other branches of government." 429 U.S. 252, 268 n.18 (1977). But given the "ingenious defiance" of equal protection perpetrated by government in our nation, a "sensitive inquiry" into legislative motivation in this context is often necessary. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (explaining how southern states denied equal protection in purportedly race-neutral ways); *Arlington Heights*, 429 U.S. at 266 (detailing how courts should determine intent for race-neutral legislation in alleged discrimination cases).

determine whether a compelling governmental interest necessitated the action.[9]

B. The *Arlington Heights* Framework Can Be Applied to Race-based Redistricting Claims

The courts already possess a valuable tool in determining whether race motivated a particular action. Recognizing that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," this Court held that deference to official action is not warranted so long as the plaintiff proves "that a discriminatory purpose has been a motivating factor in the decision." *Arlington Heights*, 429 U.S. at 265-66. The *Arlington Heights* rationale should apply equally to redistricting cases.[10]

The *Arlington Heights* framework is applied in many difficult circumstances in an attempt to ferret out impermissible racial motivation from reliance on

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[9] The district court recognized the difference between awareness and motivation, but concluded that the Legislature was entitled to deference and a presumption of good faith on this point in part due to the difficulty in drawing that distinction. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293 (citing *Miller*, 515 U.S. at 916). But, as explained above, courts routinely parse such a distinction in racial discrimination cases. *See Feeney*, 442 U.S. at 279. That racial motivation may be difficult to prove does not mean that courts are incapable of deciding cases along these lines. *See Bush*, 517 U.S. at 1000-01 (Thomas, J., concurring in the judgment).

[10] In fact, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), decided well before *Shaw*, this Court upheld a New York legislative apportionment statute on the ground that the plaintiffs failed to show that race motivated the drawing of the district lines.

permissible, race-neutral factors. Concluding that a legislative body was at least in part motivated by race does not imply that the body was motivated by "any dislike, mistrust, hatred or bigotry" against a minority group. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Nevertheless, basing a decision even in part on racial considerations in and of itself demands strict scrutiny, regardless of the nature of the decisionmaker's actual intent. Hence, the Court has directed lower courts to conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. It is the application of strict scrutiny that acts to "smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (internal quotation marks omitted)).

The initial inquiry in racial gerrymandering cases should concern whether race was used as a factor in the legislative decisionmaking process. This is analogous to the inquiry that applies in an *Arlington Heights* case, where courts must determine whether facially neutral laws are racially discriminatory in fact. *See United States v. Thurmond*, 7 F.3d 947, 952 (10th Cir. 1993). It is also the same inquiry this Court has conducted to determine if race was the "predominant factor" in redistricting. *See Miller*, 515 U.S. at 917-18 (citing *Arlington Heights* in concluding that race was the predominant factor in the drawing of Georgia's Eleventh Congressional District). The *Arlington Heights* Court instructed lower courts to consider many different factors in order to determine "whether

invidious discriminatory purpose was a motivating factor" in the government's decision. 429 U.S. at 266. Through a similar evidentiary framework, courts can determine when race has been used as a factor in legislative decisionmaking.[11] *See Miller*, 515 U.S. at 917-18; *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *6-14 (E.D. Va. Oct. 7, 2014) (concluding, based on several evidentiary factors, that an attempt to comply with Section 5 was the predominant factor in the drawing of Virginia's Third Congressional District). Where legislation is adopted in part based on race, it is presumed unconstitutional and should be struck down in most cases. *Fisher*, 133 S. Ct. at 2421 ("Strict scrutiny must not be strict in theory but feeble in fact.").

C. Federal Courts Can Distinguish Between Racial and Political Gerrymanders

Related to the difficulty in determining whether race motivated an official decision, is the difficulty in distinguishing between racial gerrymanders—which are presumed unconstitutional—and political gerrymanders—which a plurality of this Court held to be non-justiciable. *Compare Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), and *id.* at 349 (Whittaker, J., concurring), *with Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion). There is a significant

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[11] In the present case, an *Arlington Heights*-like inquiry is unnecessary because it is undisputed that race was a factor in the legislation. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293 ("[T]he Legislature sought to comply with sections 2 and 5 of the Voting Rights Act by preserving—and, in the House, increasing—the majority-black districts and by not substantially reducing the percentage of black persons in those districts.").

distinction between racial and political gerrymandering. Political gerrymanders are "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (citation omitted). On the other hand, it is never a lawful purpose to segregate voters on the basis of race. *Id.* at 286; *see also City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in the judgment) (concluding that the Equal Protection Clause compels courts to invalidate racial gerrymanders). Indeed, the *Vieth* Court rejected the *Shaw* standard for political gerrymandering cases precisely because there is an inherent distinction between political decisions and decisions motivated by race.[12]

Yet it is often true that race and political affiliation are highly correlated. In fact, one criticism of the Court's redistricting cases is that they have encouraged state legislatures to use partisan affiliation as "benign racial proxies." *See* Michelle E. O'Connor-Ratcliff, *Colorblind Redistricting: Racial Proxies as a Solution to the Court's Voting Rights Act Quandary*, 29 Hastings Const. L.Q. 61, 79-85 (2001). However, that race and partisanship are highly correlated in many states, including Alabama, does not render every political gerrymander racially motivated. The suggestion that states are now encouraged to use indicators such as partisan affiliation to discriminate on the basis of race rings hollow; it seems far more likely that a legislature would use *race* as a proxy for

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[12] The *Hunt* majority agreed when it noted that "prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." 526 U.S. at 551 (emphasis in original).

political affiliation. After all, redistricting is an "inherently political process," *Bush*, 517 U.S. at 1012 n.9 (Stevens, J., dissenting), and race may provide the most tempting approximation of a district's political leanings.[13] It should be expected that political parties will act rationally to maximize their expected allotment of seats during the apportionment process. *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation," and an Exegesis into the Judicial Role*, 78 Notre Dame L. Rev. 527, 543 (2003). Allowing plaintiffs to assume that, in a racially polarized jurisdiction, consideration of political affiliation always entails consideration of race would transform every reapportionment debate into a racial conflict.

In particular, one of the main difficulties in crafting a judicially manageable standard in political gerrymandering cases is that the question, "[h]ow much political motivation and effect is too much?" is unanswerable. *Vieth*, 541 U.S. at 296-97. But there should be no similar difficulty in racial gerrymandering cases, as the Constitution requires that all race-based governmental action be subjected to strict scrutiny. *Adarand*, 515 U.S. at 227. Any consideration of race is suspect, and it can only be permitted when it is narrowly tailored to further some compelling state interest. *Id.* Federal courts stand in the best position to separate race from legitimate

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[13] *See* How Groups Voted in 2012, Roper Center Public Opinion Archives, *available at* http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html (last visited Oct. 10, 2014) (showing that 59 percent of white voters nationwide supported Republican Mitt Romney in the last presidential election, while 93 percent of African-Americans voted for Democrat President Obama).

considerations and to strictly scrutinize those situations in which a state legislature engaged in pernicious racial balancing. Courts need only conduct the same inquiry they are required to do in many other contexts, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (describing the burden-shifting framework designed to root out impermissible discriminatory intent in employment decisions).

Although it may be difficult to prove that race and not partisanship motivated the majority caucus, it is precisely the function of the courts to make hard judgments regarding discriminatory intent. *See Arlington Heights*, 429 U.S. at 266. Rooting out the use of race in legislative redistricting is an important constitutional goal. Under *Shaw*, courts have given state legislatures too much deference and legitimized racial considerations as a key part of redistricting. Such deference is unwarranted in any other area of law and should not be tolerated in redistricting. *Cf. Fisher*, 133 S. Ct. at 2420 ("The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.").

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Id.* at 2418 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). When a government entity uses race as a factor in an official decision, it presumptively violates the Equal Protection Clause. *Id.* at 2419. It then must prove that the use of race was narrowly tailored to further some compelling interest. *Id.* (citing *Grutter*, 539 U.S. at 326). Permitting states to consider

race in legislative reapportionment cases is inconsistent with constitutional ideals and general Equal Protection jurisprudence. This Court should subject race-based legislative redistricting decisions to the same exacting judicial scrutiny as every other type of racially motivated state action. The Court should extend *Shaw* to make clear that it applies to any consideration of race.

CONCLUSION

In these cases, Alabama was prohibited by federal law from acting in a race-neutral manner. Its redistricting was done under the preclearance regime in place before *Shelby County*. In order to satisfy its constitutional obligation to redistrict every ten years, and respect the constitutional requirement of one-person, one vote, it had no alternative other than to comply with the race-conscious decisionmaking required by Section 5 of the Voting Rights Act. On this limited basis, the judgment of the district court should be affirmed.

Although the era of Section 5 preclearance is now behind us, the conflict between the Equal Protection Clause and the Voting Rights Act in redistricting is just beginning. This Court has already confronted cases where a state has defended against an allegation of racial gerrymander by claiming that its use of race was required by Section 2. *See Shaw v. Hunt*, 517 U.S. at 914 (discussing North Carolina's assertion in defense to a racial gerrymandering suit "that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under [Section 2]"). Such a result is inevitable when Section

2 is interpreted as a disparate impact statute requiring racial balancing prohibited by the Equal Protection Clause. As in the context of Title VII, "the war between disparate impact and equal protection will be waged sooner or later." *Ricci v. DeStefano*, 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring).

In the post-*Shelby County* era, states will continue to be placed in the impossible position of being required to comply with racial balancing statutes and the Equal Protection Clause simultaneously. "[T]his Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1634 (2014) (plurality opinion) (quoting *Shaw*, 509 U.S. at 647). If the Court finds that race-based redistricting should be subject to strict scrutiny in every case, it will soon have to confront the constitutionality of Section 2's vote-dilution prohibition. *See* O'Connor-Ratcliff, *supra*, at 71-74 (arguing that both Sections 2 and 5 of the Voting Rights Act are "probably unconstitutional" under the current Equal Protection jurisprudence because they would not satisfy the level of scrutiny applied in other race cases); Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate Racial Gerrymandering Cases*, 50 Stan. L. Rev. 779, 824-26 (1998) (arguing that one consequence of the interaction between Section 2, Section 5, and the racial gerrymandering cases is likely to be "heightened dominance of racial considerations in redistricting"). For now, however, the Court should

simply hold that all race-based official action must be subject to strict scrutiny.

DATED: October, 2014.

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AMICUS CURIAE BRIEF

Nos. 13-895, 13-1138

In the

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,
Appellants,
v.
ALABAMA, ET AL.,
Appellees

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,
Appellants,
v.
ALABAMA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OF THE SPEAKER OF THE ALABAMA HOUSE OF REPRESENTATIVES AND PRESIDENT PRO TEMPORE OF THE ALABAMA SENATE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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October 16, 2014

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INTEREST OF THE AMICI CURIAE

Amici curiae, the Speaker of the Alabama House of Representatives, Mike Hubbard, and the President Pro Tempore of the Alabama Senate, Del Marsh, are constitutionally-recognized presiding officers of their respective legislative chambers and were involved in passage of the redistricting plans at issue in this case. Through this brief, *amici* seek not only to represent the interests of their respective chambers in upholding the redistricting plans, but also in preserving fundamentally important principles of federalism regarding the essentially local function of redistricting.[1]

SUMMARY OF ARGUMENT

The district court correctly granted judgment in favor of the Appellees with regard to the challenges to the Alabama Legislature's 2012 redistricting plans. The district court's judgment takes proper account of the realities facing the Alabama Legislature at the time, including the historical context for the Legislature's enactment of the 2012 redistricting plans by addressing Alabama's difficult, but successful, efforts to provide equal access to the voting process and equal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief.

participation by minorities in state government. The monumental task the 2012 Legislature faced in conforming the districts to the constitutional mandate of one person, one vote, is illustrated by the history of the Democrat-controlled Legislature's gross malapportionment of the districts in the 1993 and 2001 redistricting plans, as exposed by the 2010 Census.

In reality, the Appellants' challenge to the redistricting plans is a naked political dispute raised in response to the dramatic realignment of political power in Alabama during the last two decades. In rejecting such politically-based arguments and in focusing only on the relevant facts, the district court maintained a proper respect for the important, guiding principles of federalism often emphasized by this Court in redistricting matters. As the district court did here, when reviewing legislative redistricting enactments courts should exercise caution and accord a presumption of good faith in the absence of a plainly-demonstrable violation of federal constitutional and statutory principles.

ARGUMENT

I. Alabama Has Thrown Off the Heavy Yoke of Its Discriminatory Past.

A brief review of Alabama's arduous journey on the road to providing equal access to the voting process and equal participation by minorities in state government provides important context and illuminates the Alabama Legislature's motivations for enacting the challenged redistricting plans, *see* 2012 Ala. Acts No. 602

(House Plan) and No. 603 (Senate Plan). As set forth below, that motive was, above all, to ensure fairness and equal representation pursuant to the bedrock constitutional principle of "one person, one vote."

Much ink has been spilled in recounting Alabama's tragic history during the early civil rights era. As it engaged in the 2012 redistricting process, the first Republican-controlled Legislature since Reconstruction was burdened by Alabama's tumultuous history of systemic and invidious discrimination indelibly printed on the culture of its state government and citizenry. When Congress applied Section 5's preclearance mechanism to Alabama in 1965, the State had dismally low black voter registration and turnout rates, and regularly witnessed elections characterized by overt appeals to race. Less than 20% of eligible black voters were registered to vote, whereas over 70% of eligible white voters were registered to vote. *See* H.R. Rep. No. 89-439, at 5; S. Rep. No. 94-295, at 6 (1975); *see also Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (noting that "[s]hortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama. . . . .") (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)).

Minority participation in state government was likewise nonexistent. White Democrats dominated and controlled the Legislature.[2] In the summer of 1970,

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[2] Just four years before the infamous civil rights march in the City of Selma across the Edmund Pettus Bridge on "Bloody Sunday," March 7, 1965, only 156 of 15,000 voting-age blacks in Lowndes County were registered to vote. *See* H.R. Rep. No. 89-439, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. Today, Selma is

when the state Democratic Party nominated George Wallace, Alabama did not have a single black legislator. *See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbl.5 (Am. Enter. Inst. 2005), *available at* http://www.aei.org/files/ 2006/05/05_VRAAAlabama-study.pdf (hereinafter, "Bullock & Gaddie"). During this same time, the Department of Justice sued multiple state agencies for systemic employment discrimination, as blacks representing 25% of Alabama's population held only 3.1% of state merit systems positions. *See United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970).

At first, Alabama was a reluctant traveler on the journey towards equal access and participation for minorities. Other covered states likewise progressed unhurriedly, compelling Congress to renew Section 5 in 1970, 1975 and 1982. As this Court stated, Alabama was one of those states all too "familiar to Congress" in 1965 as a "geographic area[] where immediate" and extraordinary action was "necessary." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Like an enormous freighter, Alabama moved slowly but inexorably toward reform following the 1982 reauthorization of Section 5.

Under the watchful eye of the Department of Justice, Alabama began to right the ship in the late 1980s and 1990s. By 2000, blacks had closed the voter registration and turnout gaps. *See* Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the*

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governed by an African-American mayor. *Shelby Cnty.*, 133 S. Ct. at 2626.

Voting Rights Act (Am. Enter. Inst. 2006), *available at* http://bdgrdemocracy.files.wordpress.com/2012/02/20060515_blumcampbellreport-vra-gaddie.pdf. In every year since 1990, blacks have registered and voted in larger percentages in Alabama than in states outside the South. *See* Bullock & Gaddie, *supra*, tbls. 2 & 3; Voting Rights Act: the Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). When Congress renewed and amended Section 5 in 2006, there were no gaps. As this Court recently acknowledged in *Shelby County, Ala. v. Holder*, "[v]oter turnout and registration rates now approach parity," "minority candidates hold office at unprecedented levels," and "[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years." 133 S. Ct. at 2621, 2625 (internal quotations omitted).

The widespread disenfranchisement that characterized Alabama during the early civil rights era has long vanished. Black voters are now more likely to register and politically mobilize in active support of candidates.[3] *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1286 (M.D. Ala. 2013) ("*ALBC*"). In fact, in the 2004, 2008 and 2012 general elections, Alabama black voter participation exceeded white voter participation. *See* S. Rep. No. 109-295, at 11 (July 26, 2006); Bullock & Gaddie, *supra*, tbl.3; *Voting and Registration in the Election of November 2008*, U.S. CENSUS BUREAU tbl.4b, *available at*

[3] The Court recently discussed these marked improvements in black voter registration and participation in *Shelby County*, 133 S. Ct. at 2625-26.

http://www.census.gov.hhes/www/socdemo/voting/publications/p20/2008/ tables.html; *Voting and Registration in the Election of November 2012*, U.S. CENSUS BUREAU tbl.4b, available at http://www.censusgov/hhes/www/socdemo/voting/publications/p20/2012/tables.html. In the 2012 general election, black voter participation exceeded white vote participation by 4% (66.2% v. 62.2%). *Voting and Registration in the Election of November 2012*, *supra*, tbl.4b.

As this Court noted in *Shelby County*, "history did not end in 1965." 133 S. Ct. at 2628. In contrast to the early days of the Civil Rights Act, the Alabama of today is no longer the defiant Alabama of water cannons, police dogs and voter intimidation; rather, it has joined the community of states providing equal access to the voting process and equal participation by minorities in state government. The electoral results of the last two decades reflect this progress. Since 1993, black voters have successfully elected candidates of their choice in majority-black districts. *ALBC*, 989 F. Supp. 2d at 1286. Currently, black members of the Democratic Party represent 26 of 27 majority-black House districts and 7 of 8 majority-black Senate districts. The number of majority-black Alabama House and Senate districts is roughly proportional to the black voting-age population in Alabama. Under the challenged Acts, 22.86% and 26.67% of the Senate and House districts, respectively, are majority-black districts and are populated by roughly the same percentages of Alabama's black population as in the 1993 and 2001 plans. *Id.* at 1253. By 2006, the number of black elected officials in Alabama had increased almost 500%, from 161 to 756. Bullock & Gaddie, *supra*, tbl.4.

This dramatic transformation is further evidenced by a record devoid of any evidence of overt, invidiously discriminatory voting rights violations or campaigns laced with appeals to offensive racial stereotypes. Long gone are literacy and knowledge-of-government tests and other cynical mechanisms of electoral gamesmanship used to deny black Alabamians their franchise and proper representation in state government. Moreover, it is undisputed that the Department of Justice has not objected to a single statewide preclearance submission in more than 17 years.[4] In fact, in the decade preceding Congress's renewal of Section 5 in 2006, the DOJ objected to only 0.06% of preclearance submissions from all levels of government in Alabama. *Id.*

Not only did black representation greatly increase in state government during the 1990s through the present, but also equal employment opportunities in merit systems positions across state agencies increased dramatically. By 2003, "African-Americans constituted 39% of Alabama's government workforce, a figure more than 10 percentage points greater than their representation in the general population." *United States v. Flowers*, 444 F. Supp. 2d 1192, 1193 (M.D. Ala. 2006) (known as "*Frazer/Flowers*"). Based on this progress, the Department of Justice agreed to the dissolution of all outstanding injunctive orders entered in *Frazer/Flowers*, explaining that the injunction was no longer appropriate

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[4] Minority registration and voting levels, minority participation in government and preclearance submissions and DOJ objections serve as guideposts in assessing progress of states covered by the Voting Rights Act. *See City of Rome v. United States*, 446 U.S. 156, 180-181 (1980).

because "the racial make-up of Alabama's government [wa]s dramatically different from what it was in 1970."[5] *Id.*; *see also* 11/20/2012 Order, *United States v. Director of the Ala. Dep't of Personnel, et al.*, Case No. 2:68-cv-02709 (M.D. Ala. 2012). The same district court allowed a 12-year consent decree to expire in December 2006 in a related class action brought on behalf of black merit system employees and applicants challenging racially discriminatory employment practices by the Alabama Department of Transportation. *See Reynolds v. Ala. Dep't of Transp.*, No. 2:85cv665-MHT, 2006 WL 3924790 (M.D. Ala. 2006). That court also decertified a related class action against 27 state agencies for alleged racially discriminatory employment practices. *See* 11/30/2009 Order, *In re Employment Discrim. Litig. Against the State of Alabama, Eugene Crum, Jr., et al. v. State of Ala., et al.*, No. CV-94-T-356-N (M.D. Ala. 2009).

The record established in the court below reveals a State that has thrown off the heavy yoke of its discriminatory past and that has achieved substantial progress in the area of civil rights. It is no longer a state characterized by "concerted acts of violence, terror and subterfuge in order to keep minorities from voting." *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 197, 226 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part.). In fact, this Court recently invalidated Section 4(b)'s coverage

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[5] The *Frazer/Flowers* injunctive orders set out an extensive remedial framework to redress discrimination. The district court also terminated various provisions of the *Frazer/Flowers* consent decree in 2005 and 2006. *See United States v. Flowers*, 444 F. Supp. 2d 1182 (M.D. Ala. 2006) (*Flowers II*); *United States v. Flowers*, 372 F. Supp. 2d 1319 (M.D. Ala. 2005) (*Flowers I*).

formula in *Shelby County, Alabama v. Holder*, based in part on Alabama's sustained level of progress. 133 S. Ct. 2612 (2013). The "blight of racial discrimination in voting" that "infected the electoral process" is no more. *Katzenbach*, 383 U.S. at 308.[6]

In every material respect, the Alabama of today is significantly different from the defiant and unrepentant Alabama of previous decades. Alabama does not claim to have successfully rooted out every last vestige of racial discrimination; like many states, Alabama still grapples with these issues in 2014. Any claim that Alabama remains a permanent prisoner of its tragic past, however, is unsupported by the record.

Cognizant of Alabama's turbulent civil rights history, the 2012 Legislature undertook significant,

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[6] As evidence of alleged "racial cleavage" in Alabama, the NAACP points to unsuccessful voter referenda in 2003 and 2004 to remove the remnants of Jim Crow provisions, including invalidated poll tax language, from the Alabama Constitution. NAACP Br. at 10. Yet when the Republican-controlled legislature passed similar legislation in 2012, Alabama Democrat party leaders, including ADC Chairman Joe Reed and Senator Hank Sanders, vocally and publically opposed the amendment, calling it "a hoax on the people of Alabama" and a "wolf in sheep's clothing." *See* Debbie Elliot, *Ala. Racist Language Draws Unexpected Foes*, NAT'L PUB. RADIO (Nov. 1, 2012, 12:38 PM), http://www.npr.org/2012/11/02/164107184/ala-racist-language-measure-draws-unexpected-foes; Kim Chandler, *Black lawmakers, AEA urge voters to reject amendment taking Jim Crow language out of Alabama Constitution*, AL.COM (Oct. 19, 2012), http://blog.al.com/spotnews/2012/10/black_lawmakers_urge_voters_to.html. Furthermore, to be clear, the failure of the referenda had nothing to do with the desire of Alabama citizens to remove racist language from the Alabama Constitution, but rather they failed due to an ancillary fight regarding the alleged effect of the referenda on education funding. *Id.*

additional steps to ensure a fair, race-neutral redistricting process based on the overriding constitutional principle of "one person, one vote" to correct two decades of intentional and severe malapportionment by Democrat-controlled legislatures.

II. A History of Gross Malapportionment of Districts by Democrat-Controlled Legislatures, and Not Issues of Race, Greatly Affected Creation of the Challenged Plans.

A. *The Democrat-controlled Legislature created significantly malapportioned districts in 1993 and 2001.*

A review of Alabama's 1993 and 2001 redistricting plans is also crucial to a proper understanding of how and why the Legislature drew the districts approved by the 2012 Acts. The lasting effect of those plans compellingly establishes that race was not the primary factor affecting the Legislature's creation of the 2012 plans, but rather correcting the severe and systematic malapportionment of districts by previous Democrat-controlled Legislatures.

For 136 consecutive years following Reconstruction, the State Democratic Party controlled both houses of the Alabama Legislature and, beginning in 1993, began drawing districts to protect those majorities. Under the 1993 and 2001 plans, the Democrat-controlled Legislature used a population deviation number of 10% (±5%) to "systematically underpopulate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." *ALBC*, 989 F. Supp. 2d at 1294-95. As

noted by the United States, "[t]he malapportionment was particularly severe in Alabama's majority-black districts, all of which were under populated." U.S. Br. at 4. The Democrats began this pattern of malapportionment with the creation of the Reed-Buskey plans in 1993, when they proposed, and a state court approved, 27 majority-black districts, of which 25 were underpopulated by more than 4%. *ALBC*, 989 F. Supp. 2d at 1242. The Reed-Buskey plan also underpopulated all eight majority-black Senate districts, six of them by more than 4%. *Id.*

This trend continued following the 2000 Census. As acknowledged by the United States, the Democrat-controlled legislature "had generally underpopulated majority-black districts and overpopulated nearby majority-white districts." U.S. Br. at 4-5. The district court found, "the districts established in 2001 were severely malapportioned in the light of the population data from the 2010 Census. . . ." *ALBC*, 989 F. Supp. 2d at 1241. The Democrat-controlled Legislature systematically underpopulated majority-black House districts and overpopulated adjacent predominantly white districts as part of their self-described successful partisan gerrymander in 2001.[7] In the 2001 plans, 22 of 27 majority-black House districts were underpopulated by more than 5%, and six of eight majority-black Senate districts were underpopulated, with four of those

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[7] As noted by the district court, State Democratic Party leaders filed, as *amici curiae*, a brief in this Court citing the 2001 districts as an example of a successful partisan gerrymander. *ALBC*, 989 F. Supp. 2d at 1243-44 (citing Brief for Leadership of the Alabama Senate and House of Representatives: Lowell Barron, et al. as Amicus Curiae Supporting Appellees, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580)).

districts underpopulated by more than 4%. *Id.* at 1242. The resulting malapportionment was manifest in the 2002 General Election results. Then, the Democrat leadership openly bragged that in 2002, with just 51% of the statewide vote, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. *Id.* at 1244.

During this same time period, Alabama underwent a significant realignment of political power. Republicans began winning presidential and statewide elections with increasing frequency. Additionally, despite the Democrats' overtly-partisan 2001 gerrymander, Republicans won a supermajority in both houses of the Legislature in 2010. By 2012, not one Democrat occupied a state-wide elected office. As set out more fully below, *see* discussion *infra* § III, this wholesale realignment of political power in Alabama is *the* motivating factor in this litigation.

B. *The 2010 census exposed the gross malapportionment the Democrat-controlled Legislature created in its 1993 and 2001 plans.*

New data from the 2010 Census dramatically exposed the gross malapportionment of Alabama's existing districts, revealing that the population in 80 of the 105 Alabama House districts deviated from the ideal population by more than 5%, of which 22 districts deviated above or below the ideal population by more than 20%. *Id.* at 1241. District 41, a majority-white House district in Shelby County, was overpopulated by 60.76%. *Id.* Six other white majority districts were overpopulated by 21.65 to 42.68%. *Id.* In contrast, the

2010 Census also revealed that nine of the 27 majority-black House districts were underpopulated by more than 20%, and that all 27 majority-black districts in the House were underpopulated by more than 5%, the maximum deviation used under the 2001 plan. *Id.*

The Senate districts were no better. According to the 2010 Census, 24 of 35 districts deviated from the ideal population by more than 5%, of which four districts deviated by more than 20%. *Id.* Four white-majority districts were overpopulated between 15.09 and 31.12%. *Id.* at 1242. The malapportionment was especially significant in the majority-black Senate districts. Seven of the eight majority-black Senate districts were underpopulated by more than 10%, and two of those districts were underpopulated by more than 20%. *Id.* at 1241. Plaintiffs' expert, William Cooper, acknowledged that the Legislature needed to make *significant changes* to district lines because of the severe malapportionment of the existing districts. *Id.* at 1271.

This bulwark of systematic, persistent and gross malapportionment by the Democrat-controlled Legislature was the state of affairs when the 2012 Legislature set out to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).[8] Facing this monumental challenge, the Legislature's goal, "[a]bove all," was "to correct the

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[8] The dissenting district judge ignores the 20-year pattern of gross malapportionment wrought by Democrat-controlled Legislature, choosing instead to discount the thorny challenges the Democrats created with their overtly partisan gerrymanders.

severe malapportionment," creating "more equality among districts throughout the State[,]" in order "to comply with the constitutional mandate of one person, one vote." *ALBC*, 989 F. Supp. 2d at 1294, 1296-97. At the same time, the Legislature was facing a more stringent preclearance standard under the 2006 amendment to Section 5.[9] *Shelby Cnty.*, 133 S. Ct. at 2621 (noting that in 2006, Congress extended the operation of Section 5 and amended its text "to prohibit more conduct than before").

As the dissenting district judge's opinion illustrates, failure to consider the Democrat-controlled Legislatures' prolonged history of political chicanery and the resulting significant malapportionment of the districts offers a severely skewed recitation of the facts and one that ignores the Legislature's paramount concern: creating districts that satisfy the constitutional principle of "one person, one vote." Context matters, however, because it is this past that illuminates the present.

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[9] Congress added subsections (b) through (d) to Section 5 to prohibit "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice" and stated that the purpose of that new language was "to protect the ability of such [voters] to elect their preferred candidates of choice." Voting Rights Act § 5, 42 U.S.C. § 1973c.

III. This Is a Political Dispute Masquerading as a Legal Controversy.

A. *There has been a dramatic political realignment in Alabama.*

This case is not about race or even civil rights issues generally; rather it is about the Alabama Democratic Party's loss of 136 years of uninterrupted legislative power. As their party affiliation rapidly declined, Democratic Party leaders pulled out all the stops in 2001 to create what they publicly touted as the perfect political gerrymander. Those redistricting plans ran directly into a brick wall of political realignment, as the Democratic Party began suffering consistent election losses in both state and federal elections.

Between 1875 and 1987, no Republican served as Governor. Since 1987, a Republican has held the Governor's office for 21 of the last 27 years. In 1994, no Republican served on the Supreme Court of Alabama. In contrast, no Democrat has served on the court since 2011. Four decades ago, not one Republican held a statewide elected executive branch office. Now, not one Democrat holds a statewide executive branch elected office. In 2009, the Democrat Party controlled both houses of the Alabama Legislature with healthy majorities of 60 of 95 House seats and 20 of 35 Senate seats. In 2010, Republicans won supermajorities in both houses of the Legislature, winning 22 of 35 Senate seats and 65 of 95 House seats, and they did so using the same gerrymandered districts the Democrat-controlled Legislature created in 2001. This single election cycle ended 136 uninterrupted years of Democratic Party control of both houses of the Legislature.

The outcome in federal elections mirrors Republican successes in state elections. From 1877 to 1980, no Republican served as an Alabama U.S. Senator. Republicans now have held both U.S. Senate seats since 1996. In 1991, Democrats held five of the seven U.S. House seats. Now, Republicans hold six of the seven U.S. House seats. No Democratic presidential candidate has prevailed in Alabama since Jimmy Carter. Thus, in just two decades, there has been a dramatic change in the body politic of Alabama.

This rapid loss of political influence drove the Alabama Democratic Conference and the Alabama Legislative Black Caucus to file their lawsuits in one last desperate attempt to hold on to the artificial advantage they created through their severely malapportioned districts in 1993 and 2001. Politics, and not civil rights, is the wellspring of their lawsuits; Appellants simply want the Court to redraw the districts to shield them from their significant losses and to enshrine the unfair advantage created through earlier partisan gerrymanders.

B. *The record establishes the political nature of the Appellants' challenge.*

The record compellingly reveals the naked political character of this dispute. For example, rather than offer evidence that race motivated the Republican-controlled Legislature to unfairly draw the districts in 2012, the record is rife with testimony by Democrat representatives lamenting their loss of political power and status. Principal among their complaints is the Republicans' frequent use of cloture votes to shut off debate and to vote on legislation that the Democrats strongly oppose, *e.g.*, the 2013 Alabama Accountability

Act.[10] One Democrat representative (Representative Laura Hall) lamented that she had been "clotured more during this last quadrennium than the entire 20 years [she had] been in session." *ALBC*, 989 F. Supp. at 1265. Of course, her testimony is not surprising given that her party retained control of the Alabama House of Representatives for the preceding 136 years until 2010. Another Democrat representative, Senator Quinton Ross, testified that the Republican supermajority had "abused its power" by adopting legislative procedures to pass bills opposed by his party. *Id.* at 1263. Others complained about the loss of their ability to adequately represent their districts in light of their minority status and the inability to engage in debate and offer legislative amendments in the manner they previously had done as members of the majority party. *Id.* at 1262-63. As the district court found, however, these complaints are the natural consequences of losing elections; that "the decision to invoke the rule of cloture to pass legislation being filibustered by a minority party is not an invidiously discriminatory tactic." *Id.* at 1260.

Other facts establish that this lawsuit is merely political sour grapes. As cogently described by the district court, the Plaintiffs offer a "heads I win, tails you lose" argument. *Id.* at 1303. They complain about a loss of power and the rise of allegedly-oppressive Republican supermajorities that occurred under their watch *and*

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[10] Passage of the Accountability Act of 2013 was a particularly sore subject for the Democratic Party. The Act, which an Alabama teachers' union (the Alabama Education Association) vehemently opposed, created a scholarship program to provide tuition and other assistance to enable K-12 students to escape chronically-failing public schools.

using their gerrymandered district maps. Now that the Republicans are in charge, Democrats claim that simply maintaining the relative black populations in majority-black districts they created is discriminatory because it overpopulates those districts and dilutes the black vote.[11] It takes a brass neck to make this argument. The Democrat-controlled Legislature did the same thing in 2001 after the 2000 Census revealed that majority-black districts were substantially under-populated. It redrew the districts by shifting more black voters into the majority-black districts, while carefully maintaining the same relative black populations of 60% in each district.

Second, several black elected officials and Democratic Party leaders conceded at trial that they had recommended that the Legislature maintain existing majority-black districts with black populations of 60 to 65%, claiming that the population statistics were much higher than the actual voters in the district.[12] *ALBC*, F.

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[11] The Democrats, who now claim that the Republicans have exercised their authority in an unfair manner, have very short memories regarding their own tactics. For example, in 1998, after Steve Windom became the first Republican to win the Lieutenant Governor seat since 1874, the Democrat-controlled Senate voted to strip the Lieutenant Governor of the power to make committee assignments and direct the flow of legislation. *See* David Firestone, *In Alabama, Senate Ends Bitter Rift Over Leader*, N.Y. Times, Mar. 31, 1999, *available at* http://www.nytimes.com/1999/03/31/us/in-alabama-senate-ends-bitter-rift-over-leader.html.

[12] Although now claiming racial unfairness, black Democrat Senator Hank Sanders recommended during public hearings that the black population of majority-black districts be maintained at 62%, and black Representative Tom Jackson asked that the black population of his majority-black district be maintained at 62 to 65%. *ALBC*, 989 F. Supp. 2d at 1246. Joe Reed, chairman of the Alabama Democratic Conference since 1970 and designer of several

Supp. 2d at 1246, 1266, 1302. Third, the Democratic Conference's expert previously testified in another Alabama case that even a 61% majority-black district could not guarantee black voters could elect the candidate of their choice and that no clear minimum could be set to determine across jurisdictions what voting-age population is necessary to provide a minority group the opportunity to elect its candidate of choice. *Id.* at 1272, 1303.

In addition, the Legislative Black Caucus and Democratic Conference plaintiffs cynically attack large portions of the maps they proposed and that the Permanent Legislative Committee on Reapportionment accepted. For example, the Committee incorporated substantial portions of the Montgomery County House district maps Representative Thad McClammy submitted. *Id.* at 1248, 1275, 1302. McClammy, a black Democrat, proposed the district map as a "consensus map" created by black representatives serving in Montgomery House districts. *Id.* at 1248. Notably, McClammy's proposed map also moved House District 73 to Shelby County, about which Plaintiffs now complain. *Id.*

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redistricting plans in Alabama, recommended maintaining black populations of majority-black districts at 60 to 65%. *Id.* at 1266, 1302. Senator Dial, a former Democrat and co-chairperson of the Reapportionment Committee, provided undisputed testimony that no member who represented a majority-black Senate district ever asked for a district with a black population of only 55% and that, in fact, black Senators would have rejected any proposal to populate majority-black districts at a 55% level. *Id.* at 1275. The record contains no evidence of any consensus as to the minimum black population necessary for a majority-black district to elect a candidate of its choice.

Senator Roger Smitherman, a black Democrat, acknowledged that he submitted a map for the majority-black districts in Jefferson County (Birmingham) to the Committee on Reapportionment co-chairperson Senator Dial; that he asked Dial to maintain a similar racial balance as the previous districts, which Dial agreed to do as long as it did not result in retrogression in other districts; and that Dial adopted a substantial majority of Smitherman's proposed map. *Id.* at 1261, 1274. The Committee also deferred to the requests of black Democrat Senator Vivian Figures, as well as other members of the Mobile legislative delegation not to create a new district in Mobile.[13] *Id.* at 1274-75. Another black Democrat, Senator Hank Sanders, wanted to gain minority members from a bordering district and give up population in Autauga County, which Senator Dial partially accommodated. *Id.* The Committee on Reapportionment further accommodated requests for changes to the final plans made by several Democratic representatives who wanted to swap precincts in the Birmingham area and others who made requests regarding a shared district border in northwest Alabama. *Id.* at 1252. The fact that they now attack the districts they helped create further exposes their political skullduggery.[14]

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[13] Senator Figure's lament regarding the loss of political power as a member of the minority party should fall on deaf ears. As the district court found, Figures had no problem voting for the Democrats' deliberate partisan gerrymander and for majority-black districts with similar percentages of black voters in 2001. *ALBC*, F. Supp. 2d at 1302.

[14] The Republican-controlled Legislature not only used the same procedures adopted by the Democrat-controlled Legislature in 2001, but also it improved on those procedures. For example, whereas the

Other facts similarly give away the political nature of the Democrats' challenge. For example, the votes on the 2012 plans were straight-party votes in both houses, and not votes on racial lines. Moreover, the results of the 2012 plans are contrary to any claim that the plans were drawn to harm black voter interests through packing. The House plan actually added a new majority-black district (for a total of 28); slightly increased the black population for 14 majority-black House districts, while slightly decreasing the black population of 13 majority-black House districts; and slightly increased the black population in five of eight majority-black Senate districts, while slightly decreasing the black population of the remaining three majority-black Senate districts – hardly the stuff of a packing case. *Id.* at 1253.

Moreover, the Democratic Conference's expert conceded at trial that if the Republican-controlled Legislature had intended to pack black voters into majority-black districts, it could have systematically overpopulated all of the majority-black districts, which the 2012 Acts did not do. *Id.* at. 1272.[15] In fact, the 2012

2001 Reapportionment Committee held its hearings on their 2001 plans *after* the Legislature passed the plans, the 2012 Committee solicited public comments before drafting the plans. *ALBC*, 989 F. Supp. 2d at 1246. The 2012 Committee also held more public hearings than in 2001. *Id.* at 1289. Moreover, the Legislature considered and voted on the 2012 plans in a Special Session dedicated solely to redistricting. *Id.* at 1258, 1275.

[15] More specifically, the Republican-controlled Legislature, using a ±1% population deviation guideline, could have maximized its partisan advantage by overpopulating majority-black districts by 2%, while underpopulating adjacent majority-white districts by 2%.

Legislature did the opposite, limiting its ability to draw the district lines (even for partisan gerrymandering) by adopting a ±1% population deviation guideline to ensure greater population equality. The Legislature also slightly underpopulated the overwhelming majority of majority-black districts. Even under the 2012 Acts, 21 of 28 majority black House districts and six of the eight majority-black Senate districts remain underpopulated, which is contrary to any allegation of packing.

Particularly telling is the fact that neither group of plaintiffs (nor the dissenting district judge) offer any alternative plan (or even plans for the Madison, Jefferson and Montgomery County districts) that would have added another majority-black House or Senate district as a part of a state-wide plan with 60% or more black voters in those districts that would satisfy the constitutional mandate of one person, one vote under the Equal Protection Clause of the Fourteenth Amendment while using an overall deviation in population of ±1%. *Id.* at 1264, 1266-67. All of these facts supported the Department of Justice's preclearance decision and demonstrate that race was not the primary motivating factor in the creation of the 2012 plans; that the plans "d[id] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 5, 42 U.S.C. § 1973c.

In sum, this action is "a political dispute masquerading as a legal controversy." *ALBC*, 989 F. Supp. 2d at 1236. The State Democratic Party apparatus, its power rapidly waning, asks the Court to intervene and redraw the districts to protect their dwindling political interests. The Court should decline

that invitation.[16] As stated by the district court, the Voting Rights Act and the Fourteenth and Fifteenth Amendments do not mandate a "Democratic candidate Protection Program." *Id.* at 1303 (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 223 (2007)). Nor should the Court allow civil rights laws to be used to settle political scores.

IV. The District Court's Decision Properly Balances the Need for Judicial Review With Preservation of Important Principles of Federalism.

The district court's correct decision also protects the important – but sometimes forgotten – federalism interests present in any review of a state legislature's redistricting plan. As is clear in its exhaustive, detailed opinion, the district court had a proper respect for all of the facts and difficult circumstances facing the Alabama Legislature during its redistricting deliberations.

As this Court has made clear, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well

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[16] At the same time it was losing political clout, the Alabama Democratic Party was facing an organizational and financial crisis. *See* Charles J. Dean, *The Alabama Democratic Party: Almost Bankrupt and its Executive Board Still Doubles Its Travel Budget*, AL.COM (April 11, 2013), http://blog.al.com/wire/2013/04/the_alabama_ democratic_party_a.html. Furthermore, intra-party squabbles resulted in a party split and the creation of the Alabama Democratic Majority. *See* Charles J. Dean, *The Alabama Democratic Party: 'We're Broke, Broke, Broke,'* AL.COM (May 12, 2013), http://blog.al.com/wire/2013/05/the_alabama_democratic_ party_w.html.

settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also Growe v. Emison*, 507 U.S. 25, 34 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment.") (citing numerous cases). Of course, true, plainly-demonstrable violations of the federal constitutional and statutory principles at issue here have a proper judicial remedy which can and should be pursued with vigor. This Court has explained, however, that a state legislature's balancing of the many considerations inherent in the redistricting process should be judicially re-weighed with restraint and caution:

> Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to

> make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.

Miller, 515 U.S. at 915-16 (citations omitted); *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (noting that "redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment," and that courts should be careful so as to not "displac[e] legitimate state policy judgments with the court's own preferences"); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *White*, 412 U.S. at 794-95 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.'") (quoting *Reynolds*, 377 U.S. at 533); *see, e.g., Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *7 (N.D. Ga. May 16, 2006) (noting that, "as the Supreme Court has repeatedly advised, caution is the *sine qua non* of judicial scrutiny of districting legislation").

Accordingly, this Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) (citing cases); *see also White*, 412 U.S. at 795 (directing that, in evaluating redistricting plans, a federal district court "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Stated another way, a reviewing court should strike down a state legislature's considered redistricting plan only where the plan is plainly out-of-step with relevant statutory or constitutional strictures. Otherwise, courts can be too easily overextended into what Justice Frankfurter famously called the "political thicket" of redistricting, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), by plaintiffs – such as the plaintiffs in this case – who are simply attempting to avoid the consequences of political losses (*i.e.*, elections).[17]

Even a cursory review of the district court's detailed opinion shows that the court faithfully applied

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[17] As one jurist recently put it:

> Faced with entreaties by litigants seeking judicial intervention in the redistricting process, Justice Frankfurter famously warned that "[c]ourts ought not to enter this political thicket." Although the law has not adopted the uncompromising version of this principle urged by Justice Frankfurter, his admonition continues to resonate each decade when courts are asked to decide what are fundamentally *political* disputes.

Vandermost v. Bowen, 269 P.3d 446, 485 (Cal. 2012) (Liu, J., concurring) (citations omitted; emphasis in original).

these well-established principles in this case, and in so doing properly protected the important federalism concerns raised in any redistricting dispute. Indeed, the record supports the reasonableness of the redistricting plans in this case, which were the end product of what is a very difficult task for any state legislator – a task that certainly requires "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. In this case, the legislators involved in creating the plans had to balance, among other things: (1) the fundamental constitutional principle of "one person, one vote"; (2) the principle of non-retrogression under the Voting Rights Act; (3) the concern to avoid incumbent conflicts; (4) the concern to preserve communities if possible; (5) the various personal (and not always reconcilable) preferences and desired accommodations of the various senators and representatives[18]; and (6) the preferences and concerns received in public hearings. Legislators who reasonably exercise their discretion in balancing these matters – as the record shows was the case here – should have some confidence that those balanced decisions will not be

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[18] As is discussed at various points above and as the district court's opinion illustrates, the record shows that the leadership of the Reapportionment Committee (Senator Gerald Dial and Representative Jim McClendon), and their consultant Randolph Hinaman, took great lengths to consider and accommodate the desires of the members of both houses, including Democratic members. *See, e.g.*, *ALBC*, F. Supp. 2d at 1273-78. Senator Dial testified that he was motivated in large part by a desire to make the redistricting process "more transparent and involve more people into it," because, in his opinion, there had been a substantial lack of transparency and involvement allowed during the 2001 Democrat-led redistricting (done when he was a Democrat). *See* Trial Trans. at Vol. 1, pp. 26-27.

easily undone through the courts by political opponents who merely seek to again wield power that the *state citizenry* has since denied them.

Rather than get distracted by what is in reality a fairly transparent political dispute (as discussed above), the district court focused on the lack of evidence that the Alabama Legislature's redistricting plan in any way violated federal law. The district court's properly-focused and properly-balanced approach should be affirmed.

CONCLUSION

Amici respectfully submit that the judgment of the district court was correct and should be affirmed.

Respectfully submitted,

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October 16, 2014